IN THE MATTER OF

FOREMOST DAIRIES, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

*Docket 6495. Complaint, Jan. 17, 1956—Decision, Apr. 30, 1962**

Order requiring the fourth largest dairy firm in the country to sell ten industry concerns it acquired in 1952, 1953, and 1955, which acquisitions might substantially lessen competition or tend to create a monopoly, in violation of Sec. 7 of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45) and Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. Respondent, Foremost Dairies, Inc., hereinafter referred to as "Foremost", now and at all times relevant herein, is a corporation organized and existing under the laws of the State of New York with its main and principal office located at 2903 College Street, Jacksonville, Fla.

PAR. 2. Foremost is now and at all times relevant herein has been engaged in the purchase, processing and distribution of a diversified line of dairy products. Where used herein the term "dairy products" shall include one or any number of the following products: milk, cream, ice cream, cheese, butter, eggs, canned fresh milk, and evaporated milk. Foremost distributes the various dairy products to retail consumers and to stores, restaurants, hotels and other miscellaneous outlets. Prior to and at the time of the acquisitions herein, Foremost purchased, processed and distributed dairy products in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, and still does.

PAR. 3. Foremost was initially organized in October 1931 under the laws of the State of Delaware and in 1949 Foremost was merged with

*As modified May 15, 1962.

and into Maxson Food System, Inc., a New York corporation, the continuing corporation bearing the name Foremost Dairies, Inc. In the period from 1932 to 1950, inclusive, prior to the time Section 7 of the Clayton Act was amended, Foremost acquired by purchase the stock or assets of 38 separate dairy product concerns with plant locations or equipment located in 47 communities in the States of Florida, Texas, South Carolina, Alabama, Georgia, Tennessee, Louisiana, New York, Pennsylvania, and North Carolina. At the expiration of the first year of operation of Foremost in 1932, said company had gross sales of approximately $1,000,000 and for the year 1950 Foremost had gross sales of approximately $52,000,000, with net sales of approximately $48,000,000.

PAR. 4. In a series of transactions beginning in January 1951, subsequent to the time Section 7 of the Clayton Act was amended, Foremost has acquired the stock or assets of the following-named corporations engaged in the purchase, manufacture or processing and distribution of dairy products. All the acquired corporations at the time of the said acquisitions, in the regular course of business, either purchased, processed or distributed dairy products throughout the various states of the United States or purchased and received shipments of dairy products and related equipment from manufacturers and processors located throughout the United States. All the acquired corporations, prior to and at the time of the acquisitions, purchased, processed or distributed dairy products in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act. Such acquisitions include the following:

(1) In January 1951 Foremost acquired a dairy plant formerly owned by Mrs. Tuckers Foods, Inc., a Delaware corporation, located at Sherman, Tex.;

(2) In February 1951 Foremost acquired Central Dairies, Inc., a South Carolina corporation, with main office located at Columbia, S.C.;

(3) In May 1951 Foremost acquired Sunshine Dairy Products, Inc., a Florida corporation, with main office located at Gainesville, Fla.;

(4) In June 1951 Foremost acquired Royal Dairy Products, a Florida corporation, with main office located at Tampa, Fla.;

(5) In October 1951 Foremost acquired Lauren's Pasteurizing Plant, Inc., a South Carolina corporation, with main office located at Laurens, S.C.;

(6) In February 1952 Foremost acquired International Dairy Supply Co., a Nevada corporation, with main office located at Oakland, Calif.;

(7) In February 1952 Foremost acquired International Dairy Engineering Company, a California corporation, with main office located at Oakland, Calif.;

(8) In February 1952 Foremost acquired Diamond Dairy, Inc., a Nevada corporation, with main office located at Oakland, Calif.;

(9) In February 1952 Foremost acquired Campos Dairy Products, Ltd., a Hawaii corporation, with main office located at Lanikai, Hawaii;

(10) In March 1952 Foremost acquired Gunn Ice Cream Co., a Florida corporation, with main office located at Pensacola, Fla.;

(11) In March 1952 Foremost acquired Graham's Dairy, Inc., a Florida corporation, with main office located at Pennsuco (Miami), Fla.;

(12) In March 1952 Foremost acquired Acme Dairies, Inc., a Florida corporation, with main office located at Tallahassee, Fla.;

(13 In June 1952 Foremost acquired Taylors Home Made Ice Cream Co., a Texas corporation, with main office located at Ft. Worth, Tex.;

(14) In July 1952 Foremost acquired The Phenix Dairy, a Texas corporation, with main office located at Houston, Tex.;

(15) In August 1952 Foremost acquired Ives Dairy Company, Inc., a Florida corporation, with main office located at Miami, Fla.;

(16) In September 1952 Foremost acquired Tennessee Dairies, Inc., a Texas corporation, with main office located at Dallas, Tex.;

(17) In September 1952 Foremost acquired Southern Maid, Inc., a Virginia corporation, with main office located at Bristol, Va.;

(18) In September 1952 Foremost acquired Welch Milk Company, a West Virginia corporation, with main office located at Welch, W. Va.;

(19) In October 1952 Foremost acquired Bridgeman-Russell Co., a Minnesota corporation, with main office located at Duluth, Minn.;

Foremost also acquired the wholly-owned subsidiaries of Bridgeman-Russell Co.:

(a) Dairyland Creamery Co., a South Dakota corporation, with main office located at Sioux Falls, S. Dak.;

(b) Minot Creamery Co., a North Dakota corporation, with main office located at Minot, N. Dak.;

(c) Purity Dairy Co., a North Dakota corporation, with main office located at Mandan, N. Dak.; and

(d) United Dairies, Inc., a Minnesota corporation, with main office located at Duluth, Minn.;

(20) In December 1952 Foremost acquired R. A. Shuey Creamery, a Nevada corporation, with main office located at Oakland, Calif.;

(21) In May 1953 Foremost acquired Dairymen's Milk Co., Ltd., a California corporation, with main office located at San Francisco, Calif.;

Foremost also acquired the wholly-owned subsidiary, Dairymaid Creameries, Ltd., a California corporation, with main office located at Hughson, Calif.

(22) In May 1953 Foremost acquired Banner Dairies, Inc., a Texas corporation, with main office located at Oakland, Calif.;

Foremost also acquired five affiliated holding companies which are not engaged in production but merely lease property to Banner.

(23) In July 1953 Foremost acquired Schneiders Creamery, Inc., a Florida corporation, with main office located at Eustis, Fla.;

(24) In October 1953 Foremost acquired Old Hundred, Inc., a Delaware corporation, with main office located at Southberry, Conn.;

(25) In February 1954 Foremost acquired Golden States, Ltd., a Delaware corporation, with main office located at Oakland, Calif.;

(26) In October 1954 Foremost acquired American Dairies, Inc., a Maryland corporation, with main office located at Kansas City, Mo.;

Foremost also acquired the wholly-owned subsidiaries of American Dairies, Inc.:

(a) Meriden Creamery Company, a Missouri corporation, with main office located at Kansas City, Mo.;

(b) Meriden Creamery Co., Inc., a Kansas Corporation, with main office located at Hutchinson, Kans.;

(c) American Butter Company, Inc., a Missouri corporation, with main office located at Kansas City, Mo.;

(d) De Coursey Creamery Company, a Kansas corporation, with main office located at Kansas City, Kans.;

(e) Patton Creamery Company, a Missouri corporation, with main office located at Springfield, Mo.;

(f) Arctic Dairy Products Company, a Missouri corporation, with main office located at Kansas City, Mo.;

(g) Carlin Creamery Company, a District of Columbia corporation, with main office located at Washington, D.C.;

(h) Wm. F. Huhn & Co., a Delaware corporation, with main office located at Washington, D.C.;

(i) The Aines Farm Dairy Company, a Missouri corporation, with main office located at Kansas City, Mo.;

(j) Community Dairy Products Company, a Missouri corporation, with main office located at Joplin, Mo.;

(k) Community Creamery Company, an Arkansas corporation, with main office located at Ozark, Ark.;

(l) Ozark Creamery Co., Inc., an Arkansas corporation, with main office located at Ozark, Ark.;

(m) Pratt Dairy Products Co., a Kansas corporation, with main office located at Pratt, Kans.;

(n) Tastemark Foods, Inc., a Missouri corporation, with main office located at Kansas City, Mo.;

(o) Tastemark Dairy Co., a Maryland corporation, with main office located at Paragould, Ark.;

(27) In March 1955 Foremost acquired Blue Moon Foods, Inc., a Delaware corporation, with main office located at Thorp, Wis.;

Foremost also acquired the wholly-owned subsidiary, June Dairy Products Company, a New York corporation, with main office located at New York, N.Y.;

(28) In August 1955 Foremost acquired Philadelphia Dairy Products Co., Inc., incorporated in the Commonwealth of Pennsylvania, with main office located at Philadelphia, Pa.;

Foremost also acquired the wholly-owned subsidiaries of Philadelphia Dairy Products Co., Inc.:

(a) Janssen Dairy Co., Inc., a New Jersey corporation, with main office located at New York, N.Y.;

(b) Woodlawn Farm Company, a Pennsylvania corporation, with main office located at Philadelphia, Pa.;

(c) Harrington Dairy Co., a Pennsylvania corporation, with main office located at Philadelphia, Pa.;

(d) Richmond Dairy Company, a Virginia corporation, with main office located at Richmond, Va.;

(29) In September 1955 Foremost acquired Western Condensing Company, a California corporation, with main office located at Appelton, Wis.;

(30) In October 1955 Foremost acquired Florida Dairies Company, a Florida corporation, with main office located at Miami, Fla.

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PAR. 5. As a direct result of the above listed acquisitions, Foremost is now one of the four largest purchasers, processors and distributors of dairy products in the United States and has increased its gross sales from approximately $52,500,000 and net sales of approximately $48,000,000 in 1950 to gross sales of approximately $375,000,000 and net sales of approximately $295,000,000 for the year 1954. In 1954 63 percent of Foremost's sales were derived from sales of fluid milk and cream; 20 percent of Foremost's sales resulted from sales of ice cream; and the remaining 17 percent of Foremost's sales represented sales of a wide variety of miscellaneous products. The operations of Foremost are divided into eight divisions at the present time and currently include the purchase, processing and distribution of dairy products in 30 states and Hawaii.

PAR. 6. In addition to Foremost's acquisitions of corporations hereinbefore listed, Foremost also acquired nine additional dairy products concerns in 1951 and 1952 located in the State of Florida which were individually owned and were not corporations.

PAR. 7. The constant and systematic elimination of actual and potential competitors by means of the acquisitions described in paragraphs 4 and 6 hereof are all to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 8. Foremost has violated Section 7 of the Clayton Act, as amended, in that the acquisition of the stock or assets of the corporations listed in paragraph 4 hereof either individually or collectively may have the effect of substantially lessening competition or tending to create a monopoly in the following ways, among others:

(a) Actual and potential competition between Foremost and the acquired corporations in the purchase, processing or distribution of dairy products has been or may be eliminated;

(b) Actual and potential competition generally in the purchase, processing or distribution of dairy products may be substantially lessened;

(c) The acquired corporations have been or may be permanently eliminated as an independent competitive factor in the purchase, processing or distribution of dairy products;

(d) The acquisitions by Foremost may enhance Foremost's competitive advantage in the purchase, processing or distribution of dairy products to the detriment of actual or potential competition;

(e) Competitive purchasers, processors or distributors of dairy products may be foreclosed from a substantial segment of the market in that respondent has eliminated the acquired corporations as potential suppliers or customers;

(f) Industry-wide concentration of the purchase, processing or distribution of dairy products may be increased;

(g) Foremost's competitive advantage over other purchasers, processors or distributors of dairy products may be enhanced to the detriment of actual and potential competition;

(h) The acquisitions by Foremost increased the concentration in the purchase, processing or distribution of dairy products and has eliminated a number of independent small business concerns from the industry.

PAR. 9. The foregoing acquisitions, acts and practices of respondent, as hereinbefore alleged and set forth, constitute a violation of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45) and Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950.

Mr. Bernard M. Williamson, *Mr. Raymond L. Hays*, and *Mr. Alan R. Lyness* for the Commission.

Milam, Le Maistre, Ramsay & Martin, by *Mr. George W. Milam*, of Jacksonville, Fla.; *Mr. Renah F. Camalier* and *Mr. Robert E. Freer*, of Washington, D.C.;

White & Case, by *Mr. Edgar E. Barton*, *Mr. Macdonald Flinn*, and *Mr. Thomas B. Leary*, of New York, N.Y., for respondent.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

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FINDINGS OF FACT—Continued

PRELIMINARY STATEMENT

The Commission, on January 17, 1956, issued a complaint against Foremost Dairies, Inc., a New York corporation, (sometimes hereinafter referred to as Foremost) charging it with violation of Section 7 of the Clayton Act, as amended December 29, 1950, and Section 5 of the Federal Trade Commission Act, through, and as a result of, a series of transactions beginning in January 1951.

It is alleged in the Commission's complaint that the respondent Foremost, with its main and principal business office located at 2903 College Street, Jacksonville, Fla., was engaged in the purchase, processing and distribution of a diversified line of dairy products, including one or more of the following products: milk, cream, ice cream, cheese, butter, eggs, canned fresh milk and evaporated milk, which it sold and distributed to retail consumers and to stores, restaurants, hotels and other miscellaneous outlets.

It is further alleged that, as a direct result of the acquisition of certain named corporations, Foremost was at the time of the complaint one of the four largest processors and distributors of dairy products in the United States. It is specifically alleged that Foremost had violated Section 7 of the Clayton Act in that the acquisition of the stock or assets of the corporations listed in paragraph 4 of the complaint, either individually or collectively, may have the effect of substantially lessening competition, or tending to create a monopoly in certain specified ways.

It is also alleged that, in addition to Foremost's acquisitions of corporations listed in the complaint, it had also acquired nine additional dairy product concerns in 1951 and 1952, located in the State of Florida, which were individually owned and were not corporations.

It is further alleged that the constant and systematic elimination of actual and potential competitors, by means of the acquisitions described in paragraphs 4 and 6 of the complaint: "are all to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act."

On March 20, 1956, the answer of respondent was filed in which respondent denied the allegations of paragraph 4 of the complaint, except that the respondent admitted that it had acquired the stock or assets of thirteen corporations which were engaged in commerce in the dairy products business. Answering paragraph 5 of the complaint, respondent denied the allegations "as a direct result of the above listed acquisitions," and admitted the remaining allegations of paragraph 5 of the complaint. It denied each and every allegation contained in paragraphs 6, 7, 8, and 9 of the complaint, and set up as a second defense that the acquisitions were made in the public interest.

Respondent also filed, as a part of the answer, a motion to dismiss on the grounds that the complaint failed to state a cause of action, and a motion was also made to strike, severally, from the complaint certain parts thereof as being legally insufficient, irrelevant, immaterial or impertinent. Reference to the complaint indicates that the portions covered by the motion to strike were those subparagraphs of paragraph 4 relating to acquisitions of certain small companies and corporations not engaged in commerce, and also that the motion in the answer was to strike all of paragraph 6, which is the charging paragraph as to the concerns alleged to have been acquired in violation of Section 5 of the Federal Trade Commission Act.

An answer to the foregoing motions was filed by counsel supporting the complaint on March 21, 1956.

On March 27, 1956, at the initial hearing in Jacksonville, Florida, after hearing oral argument on respondent's motion, the hearing examiner struck from the complaint the allegations with reference to the Section 5 charge, on the grounds that the Commission had no jurisdiction over the acquisitions under Section 5 of the Federal Trade Commission Act.

An appeal was taken, by counsel supporting the complaint for the Commission, from this ruling of the hearing examiner on April 23, 1956. Answer was filed to this appeal by respondent on May 21, 1956.

On June 4, 1956, the Commission sustained the appeal of counsel supporting the complaint, and reversed the ruling of the hearing examiner in the following language:

> The Commission being of the opinion that the hearing examiner was in error in this respect, and that facts indicating a violation of Section 7 of the Clayton Act, as amended, may also indicate a violation of Section 5 of the Federal Trade Commission Act, and, further, that practices not technically within the scope of a specific section of the Clayton Act may nevertheless constitute a violation of Section 5 of the Federal Trade Commission Act; and
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> The Commission being of the further opinion that in electing to charge a respondent in this case with violation of both Secton 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, the Commission acted in the exercise of its administrative discretion, and that in so doing it made a decision on which the hearing examiner has no authority to sit in judgment.

Following this ruling, counsel supporting the complaint, in a series of hearings, introduced evidence with reference to both the Section 7 allegation and the Section 5 allegation. Prior to, and following this ruling, approximately 1700 pages of testimony and more than 500 exhibits were introduced by counsel supporting the complaint, and were received in evidence.

On August 9, 1957, counsel supporting the complaint moved to amend paragraph 4 of the complaint to conform to the proof as to further acquisitions, which said motion was granted, and the answer by respondent to the original complaint was allowed to stand for the amended complaint. On the same date, counsel supporting the complaint closed their case in chief.

On December 9, 1957, respondent filed a motion to dismiss and to strike, relating to both the Section 7 charge and the Section 5 charge. This motion was followed by a brief filed on December 20, 1957, in support of said motion. Counsel in support of the complaint filed a motion and brief in opposition to respondent's said motion on March 17, 1958. Oral argument on said motion was held before the hearing examiner on May 8, 1958.

On May 12, 1958, the hearing examiner entered a formal order dismissing respondent's said motion to dismiss and to strike.

On June 19, 1958, respondent filed a motion to amend the hearing examiner's order denying its motion to dismiss and to strike. The substance of this motion was practically identical with the motion filed at the close of Commission's case in chief, in that it raised no new questions not heretofore argued and adjudicated, except that respondent asked for a ruling in the nature of a declaratory judgment as to which of the acquisitions, according to the hearing examiner, had violated Section 7 of the Clayton Act.

On July 10, 1958, the hearing examiner, at the beginning of the taking of evidence in support of respondent's defense, held an oral argument on respondent's motion. During the course of this argument, at the request of the hearing examiner, counsel in support of the complaint made an explanation of their position with respect to what remedy they expected to invoke, other than divestiture, under the Section 5 charge. Thereafter, the hearing examiner made the following ruling:

Now, in doing that I want to make very plain that I haven't examined this record with a fine-tooth comb, and I may change my mind before I write my final decision, but as the record now stands on the theory of conglomerate acquisitions, which apparently is contemplated by Congress as being a little broader scope under the amended Section 7 of the Clayton Act than was contemplated in the original Section 7 of the Clayton Act, conglomerate acquisitions have been brought within the purview of the statute. So, on that theory that your motion for dismissal was overruled as much as anything else, in my judgment you should make an attempt to defend or to present evidence in opposition to whatever evidence has been presented on the following firms, whose acquisitions have been either by stock acquisition, stock exchange, or purchase of assets; International Dairy Supply Co.; Campos Dairy Products, Ltd.; Gunn Ice Cream Company; Phenix Dairy; Ives Dairy, Inc.; Southern Maid, Inc.; The Welch Milk Company; Bridgeman-Russell Company, Inc.; Marin Dairymen's Milk Co., Ltd.; Dairy Maid Creameries, Ltd.; Banner Dairies, Inc.; Widemire's, Inc.; Crescent Creamery Company; Old Hundred, Inc.; Moanalua Dairy, Ltd.; and even Rico Ice Cream Company, Ltd. of Hawaii; Golden State Company, Ltd.; Ives Ice Cream Company, a Florida firm; The DeSoto Ice Cream Division of Armour and Company; Portsmouth Pure Milk Company and Pure Milk Company, Inc.; American Dairies, Inc.; Blue Moon Foods, Inc.; Philadelphia Dairy Products, Inc.; Florida Dairies Company; and Central Dairies, Inc. (Tr. 1833–4)

At this point, counsel supporting the complaint asked whether or not respondent would be required to put in any proof with reference to non-corporate acquisitions.

The hearing examiner ruled:

As far as I am concerned, they won't, because I don't propose to make any fidings on those acquisitions. I will bunch them together into one group and say, as to these companies, testimony was taken in support of the complaint, and that is all.

The attorneys supporting the complaint then asked if the ruling was that:

. . . we have not made out a prima facie case with reference to the Section 5 charge?

The ruling of the hearing examiner was, at this point:

No. My ruling is that I am not passing on it. I have already passed on it, and the Commission has reversed me; so, that is still my position. You can argue them before the Commission any way you want to on that. The case is open on that particular phase of it.

The examiner also ruled at that time that the Commission could decide whether or not the attorney in support of the complaint had made out a prima facie case, and whether or not they want anything done; that in the event the Commission determined that the attorneys in support of the complaint had made out a prima facie case under the Section 5 charge, it would be necessary for them to go back with the respondent and take defensive testimony with reference to these non-corporate acquisitions. The hearing examiner indicated that he was not going to require the respondent to do it, and that if the Commission wanted to require them to do it they may.

On July 21, 1958, counsel in support of the complaint filed an appeal with the Commission from the ruling of the hearing examiner of July

10, 1958, as to the Section 5 charge. This appeal was answered by counsel for the respondent on August 19, 1958.

On September 10, 1958, the Commission granted the appeal of counsel in support of the complaint, and vacated the ruling of the hearing examiner of July 10, 1958. In taking this action, the Commission noted that the hearing examiner had not ruled that counsel supporting the complaint had failed to make a prima facie case as to the (Section 5) allegations in the complaint. The following language also appears in the opinion:

> The effect of the ruling is to preclude any final decision on the acquisitions so eliminated, short of a remand, since respondent may rightfully claim hereafter that it had no opportunity to defend as to these. The Section 5 charge presents questions of law and fact which the Commission prefers to determine upon a complete record. This includes as to such charge any proper defense of the acquisitions concerned which the respondent may wish to offer.
>
> We hold, therefore, that it was error for the examiner to rule that the acquisitions other than those he listed need not be defended. Accordingly, the appeal of counsel supporting the complaint is granted and appropriate order vacating the examiner's ruling will be entered.

Following the foregoing ruling of the Commission, approximately 3400 pages of testimony were taken in opposition to the allegations of the complaint, and more than 400 exhibits were received in evidence. Counsel for respondent closed their case in chief on March 31, 1960. Thereafter, rebuttal testimony was received in April and June 1960. The taking of testimony was closed June 3, 1960. Thereafter, on August 19, 1960, counsel in support of the complaint filed proposed findings, consisting of nearly 300 pages, and, on the same date, counsel for respondent filed their proposed findings containing more than 300 pages. Oral argument thereon was held September 7, 1960.

Consideration has been given to the respective proposed findings, and all the reliable, probative and substantial evidence in the record upon material issues of fact and law. Each of the proposed findings which have been accepted has been, in substance, incorporated into this initial decision. All proposed findings not so incorporated are hereby rejected.

In view of the opinion of the hearing examiner, as hereinafter set forth in the conclusions, no detailed findings will be made with respect to the following acquisitions by the respondent:

Proprietorships

1. H. H. Parrish, and Almeida P. Parrish, trading and doing business in the name of Superior Dairy Products, Orlando, Florida.

2. O. H. Thomas, trading under the firm name of University City Dairy, Gainesville, Florida.

3. F. L. Clough and Roxie M. Clough of Starke, Bradford County, Florida.
4. P. S. Gonzales, doing business under the name of Phil's Dairy, in Alachua, Florida.
5. Carl C. Swebilius, DeLand, Florida.
6. W. W. Lively, Mrs. W. W. Lively, and Mrs. W. J. Brownlee, in partnership, doing business as Brownlee & Lively Dairy, Atlanta, Georgia.
7. Mr. and Mrs. C. R. Whitehurst, doing business as Whitehurst Dairy, Gainesville, Florida.
8. E. H. Harty, doing business under the trade name of Jacksonville Home Milk, Jacksonville, Florida.

Corporations

9. Mrs. Tucker's Foods, Inc., Sherman, Texas.
10. Sunshine Dairy Products, Inc., Gainesville, Florida.
11. Royal Dairy Products, Inc., Tampa, Florida.
12. Laurens Pasteurizing Plant, Inc., Laurens, South Carolina.
13. Diamond Dairy, Inc., Oakland, California.
14. Acme Dairies, Tallahassee, Florida (in receivership).
15. Taylor's Homemade Ice Cream Co., Fort Worth, Texas.
16. R. A. Shuey Creamery, Oakland, California.
17. Schneider's Creamery, Inc., Eustis, Florida.
18. Redwood Empire Dairies, Inc., Fortuna, Humbolt County, California.
19. Vander Bie's, Inc., St. Paul, Minnesota.
20. Hage's Ltd., San Diego, California.
21. Thompson Brothers Ice Cream Company, Butler, Pennsylvania.
22. Slade's Dairy, Inc., Santa Fe, New Mexico.
23. H. A. McDonald Creamery Co., Detroit, Michigan.
24. Jones and Griest, Inc., Washington, Pennsylvania.

The foregoing concerns, beginning with Mrs. Tucker's Foods, Inc., are corporations, but, according to the evidence in the record produced by counsel supporting the complaint, they were not engaged in interstate commerce, either in the purchasing of raw materials or in the sale of dairy products.

Full findings will be made with respect to the following acquisitions of corporations which were, at the time the testimony was taken, believed to be engaged in commerce:

1. Central Dairies, Inc., a South Carolina corporation, Columbia, South Carolina.
2. International Dairy Supply Co., a Nevada corporation, Oakland, California.
3. Campos Dairy Products, Ltd., a Hawaiian corporation, Honolulu, Hawaii.
4. Gunn Ice Cream Company, a Florida corporation, Pensacola, Florida.
5. Graham's Dairy, Inc., a Florida corporation, Miami, Florida.
6. Phenix Dairy, a Texas corporation, Houston, Texas.
7. Ives Dairy, Inc., a Florida corporation, Miami, Florida.
8. Tennessee Dairies, Inc., a Texas corporation, Dallas, Texas.
9. Southern Maid, Inc., a Virginia corporation, Bristol, Virginia.
10. The Welch Milk Company, a West Virginia corporation, Welch, West Virginia.

11. Bridgeman-Russell Co., Inc., a Minnesota corporation, Duluth, Minnesota.
12. Marin Dairymen's Milk Co., Ltd., a California corporation, San Francisco, California.
13. Dairy Maid Creameries, Ltd., a California corporation, Hughson, California.
14. Banner Dairies, Inc., a Texas corporation, Abilene, Texas.
15. Widemire's, Inc., an Alabama corporation, Sylacauga, Alabama.
16. Crescent Creamery Company, a South Dakota corporation, Sioux Falls, South Dakota.
17. Old Hundred, Inc., a Connecticut corporation, Southbury, Connecticut.
18. Moanalua Dairy, Ltd., a Hawaiian corporation, Honolulu, Hawaii.
19. Rico Ice Cream Company, Ltd., a Hawaiian corporation, Honolulu, Hawaii.
20. Golden State Company, Ltd., a Delaware corporation, San Francisco, California.
21. Ives Ice Cream Company, a Minnesota corporation, Minneapolis, Minnesota.
22. The DeSoto Ice Cream Division of Armour and Co., an Illinois corporation, Minneapolis, Minnesota.
23. Portsmouth Pure Milk Company, an Ohio corporation, Portsmouth, Ohio, and Pure Milk Company, Inc., a Kentucky corporation, Ashland, Kentucky.
24. American Dairies, Inc., a Maryland corporation, Kansas City, Missouri.
25. Blue Moon Foods, Inc., a Delaware corporation, Thorp, Wisconsin, and June Dairy Products Company, a New York corporation (wholly owned subsidiary of Blue Moon Foods, Inc.)
26. Philadelphia Dairy Products, Inc., a Pennsylvania corporation, Philadelphia, Pennsylvania.
27. Florida Dairies Company, a Florida corporation, Miami, Florida.
28. Western Condensing Company, a California corporation, Petaluma, California.

Appropriate findings of fact, conclusions and order are hereinafter set forth.

FINDINGS OF FACT

I

DESCRIPTION OF RESPONDENT AND ITS GROWTH

A. *Respondent's Inception, Growth and Acquisitions Prior to 1951.*

1. *The Inception of Foremost Dairies, Inc.*

The present Foremost Dairies, Inc., a New York corporation, was evolved from its original formation as a Florida corporation which, in October 1931, succeeded to an earlier corporation known as Foremost Dairy Products Corporation. At its inception, Foremost took over certain assets of the predecessor company, including milk processing plants in Jacksonville and Daytona Beach, Florida; Valdosta, Georgia; and Birmingham, Alabama. Foremost continued to serve those markets, and within a year acquired plants previously owned by the predecessor company in four other markets, namely, Atlanta and Savannah, Georgia; Charlotte, North Carolina; and Spartanburg, South Carolina. From the very beginning, respondent may be described as a multi-plant operation, that is, the operation of a number of plants in various market areas under one administrative head.

2. *Pre-Complaint Acquisitions.*

a. Prior to 1945.

In the mid 1930's, Foremost first entered the Miami, Florida, market, with the acquisition of Christiansen's Dairy, which was engaged in both the fluid milk and ice cream business, with sales aggregating approximately $250,000 a year. In 1937, Foremost acquired an ice cream plant in the Oakmont Section of Pittsburgh, Pennsylvania. By 1941, respondent was serving 14 communities, as compared with its original territory of 12 communities, scattered in four southern states, but its sales had nearly quadrupled.

In 1942, Foremost acquired the Jacksonville, Florida, milk business of a producer-distributor, S. Ben Skinner, who operated one or two milk routes. In that same year, in Jacksonville, respondent acquired, from Coble Dairy Products, its warehouse and cream and condensed milk distribution business. This business included neither milk nor ice cream, and consisted of sales to other dealers. Foremost operated this business for a short period and then discontinued it, and subsequently sold the building acquired. In 1942, Foremost also acquired an ice cream plant in Brooklyn, New York. This plant was closed in 1955, and the property subsequently sold.

b. 1945 Acquisitions.

In 1945, Foremost acquired a small ice cream plant in Miami, Florida, from the Miami Ice Cream & Dairy Company. No milk business was involved in this transaction. From a Miami producer-distributor, Meadowbrook Farms, respondent also acquired two to four milk routes. That year, Foremost also acquired, from Florida Milk Company, a small plant operating not more than five or six milk routes in St. Petersburg, Florida, where Foremost was not then in business. Respondent also acquired, in 1945, the milk business, consisting of three or four routes, of Aristocrat Dairy Products Co., in Atlanta, Georgia. The former owner retained his ice cream operation, and continued in business in Atlanta. Another small milk plant was acquired by respondent in 1945 from City Dairies, in Kingsport, Tennessee. In Charlotte, North Carolina, a producer-distributor operating five or six milk routes, under the name Arrowood Farms, sold his business to Foremost after his plant had burned. A final small acquisition, in

1945, was respondent's entry into the Montgomery, Alabama, market through Young Ice Cream Company, which operated approximately three routes.

A substantial acquisition was made by respondent in 1945, when it purchased, from a Court-appointed receiver, the remaining assets of Southwest Dairy Products Company, consisting of combination milk and ice cream plants in San Antonio, Texas, and Shreveport, Louisiana; a milk plant in Fort Worth, Texas, and an ice cream plant in Houston, Texas; a milk receiving station at Cleburne, Texas; and ice cream distribution points at Beaumont and Huntsville, Texas. Southwest Dairy Products Company had been in business for 25 to 30 years, and had attained sales of approximately $3 million. Foremost had not previously done business in any of these areas served by this acquired company.

By 1945, respondent, with its entry into the various markets above described, had increased its sales to more than three times its 1941 level, or approximately fourteen times its 1932 revenue.

c. 1946 Acquisitions.

In 1946, Foremost acquired a small, local butter business from Jefferson Creamery in Americus, Georgia. Respondent used the plant for a time to furnish butter for its manufacture of ice cream in Atlanta and Columbus, Georgia, and later discontinued this operation. That same year, Foremost acquired the Forth Worth and Abilene, Texas, ice cream business of Pangburn Ice Cream Co., which was owned by a candy company that was abandoning its ice cream operations. Foremost had no dairy business of any kind in the Abilene market prior to this acquisition. By the end of 1946, Foremost was serving thirty communities in eight states.

d. 1947 Acquisitions.

Respondent, in 1947, acquired the J. C. Carroll Co.'s small plant and ice cream business in Florence, Alabama; Fayetteville, Tennessee; and outlying sections of Tennessee. Shortly thereafter, in 1947, Foremost acquired and consolidated with the Carroll Operation, a small ice cream plant of the Florence Creamery, Inc., in Florence, Alabama. That same year, in Miami, Florida, Biltmore Dairy Co., a small producer-distributor, which had sold its farm for real estate development, disposed of its approximately four milk routes to respondent. Less than half of its equipment was used by Foremost, and the balance was taken by suppliers who held liens upon it. In Houston, Texas, respondent added to its existing ice cream business with the acquisition of the fluid milk plant of the Metzger Dairy Co. Also, in 1947, Foremost acquired and integrated into its existing business in Spartanburg, South Carolina, two or three routes of a producer-distributor operating as Smith's Dairy, who continued to produce milk on his farm. Finally, respondent acquired the ice cream business of A. A. Anderson in Ruston, Alabama.

e. 1948 Acquisitions.

The three or four milk routes of Louis Sheffield, a small Jacksonville producer-distributor, were purchased by Foremost in 1948. In Houston, Texas, the milk business of F. & M. Dairies, Inc., otherwise unidentified, was acquired. That same year, respondent acquired the small ice cream business of the Watson Ice Cream Co. in Shreveport, Louisiana.

f. 1949 Acquisitions.

Respondent entered the St. Augustine, Florida, market in 1949, with the acquisition of Superior Dairies, Inc., which operated a combination milk and ice cream plant. The owners, producers with considerable farm interests, continued their milk producing business. It was estimated that the sales of this concern represented from eight to ten percent of the total volume of fluid milk in the St. Augustine area. Foremost also entered the Columbia, Tennessee, market that year with its acquisition of Tuell Dairy Co., a milk and cheese concern operating six to eight milk routes. The small ice cream distribution of Tasty Ice Cream Co., in the towns of Sherman and Bonham, Texas, was also acquired by respondent in 1949. There was no plant involved in this transaction. Another small producer-distributor in Jacksonville, Florida, W. V. Chason, operating two fluid milk routes, sold them to Foremost when he gave up distribution to concentrate on production. Similarly, in Houston, Texas, respondent acquired one or two milk routes operated by L. B. Fish, a small producer-distributor.

g. 1950 Acquisitions.

In 1950, respondent acquired the Bluebird Ice Cream Co., which operated a small ice cream plant and two retail ice cream stores in Spartanburg, South Carolina, and one retail store in both Columbia, South Carolina, and Gastonia, North Carolina. In Daytona Beach, Florida, that year, a producer-distributor, Ernest Dowdy, discontinued his distribution and sold his two or three routes to Foremost, but continued production. At Beaumont, Texas, where Foremost had been distributing ice cream by truck from its Houston plant, Colonial Ice Cream Company, which was going out of business, was acquired. Solomon Dairy, a small producer-distributor, with a milk distribution of about 200 gallons a day, and a small ice cream business in the Town of Quincy, population 5,000, in West Florida, sold their distribution to respondent in 1950, and continued the production of milk on his farm.

In that same year, Foremost also acquired the Sumter, South Carolina, milk business of a producer-distributor, Quaker House, Inc. It also acquired the Lure Ice Cream Co., a small plant located in East Point, Georgia, a suburb of Atlanta, selling ice cream mix to drive-in stands in the Atlanta area, and integrated its business into respondent's Atlanta plant. It next acquired the Caroline Dairies in Columbia, South Carolina, which involved a milk business owned by a farmer who had previously purchased it from Central Dairies, an ice cream company in Columbia, which was subsequently acquired by respondent, as will hereinafter be set forth. The City Dairy Company, in Statesboro, Georgia, a small ice cream company, was acquired by respondent in 1950. Its distribution was integrated into Foremost's existing routes. Finally, respondent acquired Florida Milk Farm's approximately six routes in Miami, Florida, in 1950, when this producer-distributor sold its farm for real estate development.

By the end of 1950, Foremost was serving 44 southern communities, and was considered to be the South's largest independent dairy company, and one of the ten largest dairy companies in the nation.

B. *Respondent's Financial Record.*

Respondent's financial growth, from its inception, 1932 to 1959, as shown by the record, has been as follows:

Year	Net sales	Net Income	Total assets
1932	$1, 000, 000	None	$------------
1940	2, 828, 066	$118, 590	2, 182, 337
1946	26, 383, 646	966, 575	7, 451, 445
1947	29, 067, 447	626, 268	10, 166, 581
1948	33, 040, 151	798, 168	10, 908, 411
1949	42, 011, 579	1, 245, 031	12, 970, 497
1950	48, 160, 059	1, 248, 886	15, 812, 655
1951	53, 249, 343	1, 508, 493	21, 253, 943
1952	77, 536, 951	1, 948, 415	29, 017, 850
1953	117, 154, 492	3, 018, 095	42, 210, 264
1954	247, 379, 029	6, 101, 920	90, 361, 197
1955	388, 068, 990	8, 637, 038	141, 889, 355
1956	382, 395, 852	10, 163, 912	142, 543, 769
1957	415, 141, 110	10, 533, 344	147, 619, 525
1958	416, 447, 923	9, 600, 964	147, 294, 650
1959	440, 090, 281	10, 493, 745	155, 174, 425

II

RESPONDENT'S ACQUISITIONS OF CORPORATIONS ENGAGED IN COMMERCE AND THEIR MARKETS, 1951–1956

A. *Introduction.*

In the findings set forth in this section, there are presented the salient facts of record relating to products handled and competitive conditions in the markets involved as to each of the acquisitions of corporations believed at the time the testimony was taken to be engaged in commerce. The acquisitions are not presented in the chronological order of the dates of their acquisition.

B. *The Acquisitions and Their Markets.*

1. *Western Condensing Company, a California Corporation, with Executive Offices in Petaluma, California, and General Offices in Appleton, Wisconsin.*

(a) The Acquisition.

On September 22, 1955, Foremost acquired the capital stock of Western Condensing Company (sometimes hereinafter referred to as Western) in a stock exchange whereby 1.2 shares of Foremost common stock were exchanged for each one outstanding share of Western stock. Prior to the acquisition, Western was engaged principally in the processing of whey, a by-product in the manufacture of cheese, and other milk by-products into feed ingredients, animal feed products, lactose, and other edible products prepared from whey.

For the year ended March 31, 1955, Western produced approximately 129,000,000 pounds of feed ingredients which were sold for approximately $7,250,000; approximately 45,000,000 pounds of animal feed products, which were sold for approximately $2,800,000; 27,000,000 pounds of lactose, and other food products, which were sold for approximately $3,500,000. Total sales for the year were approximately $14,000,000, with a net income of approximately $600,000.

Prior to the acquisition, Western owned a 50% interest in the Instant Milk Company, with the Carnation Company owning the other 50% interest. The Instant Milk Company manufactured and marketed products using a process developed in Western's laboratories.

(b) Market Conditions.

There is no evidence in the record as to the nature and extent of the market in the areas where the products manufactured are sold.

2. *Blue Moon Foods, Inc., a Delaware Corporation, with Principal Offices in Thorpe, Wisconsin, and its Wholly Owned Subsidiary, June Dairy Products Co., Inc.*

(a) The Acquisition.

Pursuant to an agreement dated December 24, 1954, Foremost acquired the outstanding capital stock of Blue Moon Foods, Inc. (sometimes hereinafter referred to as Blue Moon), and the wholly owned subsidiaries of Blue Moon, June Dairy Products Co., Inc., a Delaware corporation (sometimes hereinafter referred to as June Dairy), located at New York, New York; and two small Wisconsin cheese corporations, issuing therefor 131,934 shares of Foremost common stock, having a market value, at the date of acquisition, of approximately $2,375,000, plus $1,979,000 par value of Foremost preferred stock. Foremost was also to assume all liabilities of Blue Moon, which, as of December 31, 1954, amounted to approximately $3,160,000.

Prior to the acquisition, Blue Moon and its subsidiaries were engaged in the manufacture and processing of cheese, and in the wholesale distribution of butter, cheese, powdered milk, margarine, frozen foods and dehydrated fruits and vegetables. For the year preceding the acquisition, Blue Moon and its subsidiaries had net sales of approximately $49,500,000, and, as of December 31, 1954, total assets of approximately $7,160,000.

For the fiscal year ended March 31, 1954, Blue Moon had cheese sales of approximately 37 million pounds and butter sales of approximately 60 million pounds. During the same year, its wholly owned subsidiary, June Dairy, sold approximately 25 million pounds of butter, approximately 14 million dozen eggs, approximately 2,300,000 pounds of poultry, and approximately 2,400,00 pounds of margarine, plus an unspecified amount of cheese. June Dairy was a distributor for Blue Moon and maintained distributing facilities in Jersey City, New Jersey, Bridgeport, Connecticut, and Miami, Florida, from which a complete line of cheese, butter, powdered milk, and miscellaneous food products were distributed.

(b) Market Conditions.

The record indicates that, at the time of the acquisition of Blue Moon and its subsidiary June Dairy, the respondent was engaged in the manufacture and distribution of some butter and cheese, but there is no evidence to indicate whether it was in competition with Blue Moon in such operation. Furthermore, there is no evidence in the record as to the competitive market conditions in those areas where June Dairy distributed products other than those handled by the respondent, such as eggs, poultry, canned meats, powdered milk, margarine, frozen foods, dehydrated fruits and vegetables.

3. *International Dairy Supply Company, a Nevada Corporation, and International Dairy Engineering Company, a California Corporation, Both with Offices in Oakland, California.*

(a) The Acquisition.

On February 11, 1952, Foremost purchased all the outstanding capital stock of the International Dairy Supply Company (sometimes hereinafter referred to as International Dairy). In the same transaction, Foremost also acquired the capital stock of International Dairy Engineering Company (sometimes hereinafter referred to as International Engineering), and Diamond Dairy, Inc., a Nevada corporation. The total consideration paid for these three concerns consisted of $3,000,000 cash, and 152,375 shares of Foremost common stock, which stock had a then market value of approximately $2,285,000. Among the assets of International Dairy, acquired by Foremost, was all the outstanding capital stock of Campos Dairy Products, Ltd., of Honolulu, Hawaii, hereinafter mentioned under the reference to acquisitions made in Hawaii.

International Dairy was engaged in the production and sale of recombined milk, cream, buttermilk, ice cream and cottage cheese. It was formed by Grover B. Turnbow, now President of respondent, for the purpose of selling recombined milk and other dairy products to the United States Army for use by the armed forces in Japan, Okinawa and Guam. At the time of the acquisition of International Dairy, Mr. Turnbow became a director and Vice President in Charge of Operations of respondent Foremost, and he continued as President and Manager of the two subsidiary corporations, International Dairy and International Engineering.

International Engineering was organized by Turnbow to do engineering research, and to build plants and supply the dairy product ingredients for recombined milk and other dairy products for the Far East operations carried on by International Dairy. It produced anhydrous fats and milk solids which were shipped to International Dairy for further processing. Its only other customer was the United States Government, which once a year purchased fats and solids used in making recombined dairy products on Adak Island in the Aleutians. It operated a new plant at Atwater, California.

(b) Market Conditions.

There is no evidence in the record as to the competitive market conditions in the products manufactured and sold by International Dairy, all of which, as hereinbefore indicated, were sold outside of the mainland of the United States.

With respect to the subsidiary, Diamond Dairy, Inc., the evidence in the record indicates that, prior to the acquisition, it was engaged in processing and distributing fluid milk at wholesale and retail in the Oakland, California, area. It had at that time, approximately 2.4% of the total fluid milk sales in the Alameda-Contra Costa marketing area. It was later merged with the R. A. Shuey Creamery, acquired by respondent in December 1952. The acquisition of Diamond Dairy was the initial entry of respondent in California in the processing and marketing of fluid milk. The Diamond Dairy facilities were used primarily as a control laboratory for the testing of the recombined milk product ingredients that were shipped to the Far East.

4. *Florida Dairies Company, a Florida Corporation, Miami, Florida.*

(a) The Acquisition.

By an agreement, dated August 29, 1955, respondent purchased the assets of Florida Dairies Company, Miami, Florida, paying therefor 40,000 shares of Foremost common stock having a market value of approximately $980,000. Florida Dairies was a single plant concern, selling its fluid milk primarily at retail in the Miami, Florida, area. It had a plant capacity of approximately 8,000 gallons a day, and in 1955 it sold approximately 1,800,000 gallons of fluid milk. As of April 30, 1955, it had total assets of approximately $1,200,000, and during the year ended, its net profit was approximately $159,000.

(b) Market Conditions.

The record contains evidence with respect to the sales of the principal distributors of fluid milk and ice cream in the Miami area for the year 1950, when Foremost's sales began to be substantial in that area. At that time, respondent's sales of fluid milk represented approximately 8% of total sales of fluid milk in the Miami area. The other principal distributors of fluid milk in that area were Borden, with 20%; McArthur, a local dairy, with 20%; and Home Milk, another local dairy, with 18% of total Miami area sales in 1950. Two other local dairies, which Foremost acquired in 1952, were Graham's Dairy and Ives Dairy, with 3% and 2% respectively, of total sales in that area in 1950. During that same period, Foremost had 17% of the sales of Ice Cream in the Miami area, its principal competitor Swift, had 26%, Sealtest, 24%, and Borden, 19%.

At the time of the acquisition of Florida Dairies, in 1955, Foremost's share of the fluid milk market, in the area comprising Dade, Broward and Monroe Counties (an area larger than the Miami area, in which Florida Dairies sold), was 9.2%, and Florida Dairies, was 6.96%. The other principal competitors in the sale of fluid milk in that area were McArthur, with 23.03%; Miami Home Milk, with 15.94%; and Borden, with 11.18%. Combining the above percentages of Foremost and Florida Dairies, for that year, gave it 16.16%, and placed it in second position in that three-county area in the sale of fluid milk. In other words as a result of the acquisitions which Foremost had made between 1950, and the acquisition of Florida Dairies in 1955, it advanced from approximately 8% of the fluid milk sales in the Miami area to 16.16% of fluid milk sales in the three-county area referred to above. There is no indication of an advance in the share of market in the sale of ice cream.

Counsel for the respondent, in their proposed findings, with respect to this acquisition argued that respondent had not adversely affected competition in the Miami fluid milk market, apparently basing their argument upon the leadership in the market of local, independent concerns, and the inability of respondent to hold the share of the market which it held at the time of the acquisition of the local processors. They contend that respondent was third in the market, instead of second as has been found by the undersigned; from an analysis of the exhibits presented in this record. On the other hand, it is believed that there is a definite tendency to gain a dominant position in the Miami area on the part of the respondent in the fluid milk market, which admittedly, a multi-plant operator, has an advantage over its local competitors, and has advanced from a minor factor in the market to a major factor, and, although it has not yet attained full leadership, it is found that the acquisition of Florida Dairies, Inc., has given the respondent a decisive advantage over its competitors in the sale of fluid milk in the Miami area. Its largest competitor in this area, McArthur, being a local concern, does not have the advantage of the diversified operation enjoyed by respondent.

5. *Philadelphia Dairy Products, Inc., a Pennsylvania Corporation, Philadelphia, Pennsylvania.*

(a) The Acquisition.

In July 1955, Foremost acquired operating control of Philadelphia Dairy Products, Inc. (sometimes hereinafter referred to as Philadephia Dairy), with principal offices located in Philadelphia, Pennsylvania, and four wholly-owned subsidiaries. By May 15, 1956, Foremost had acquired 96% of the capital stock of Philadelphia Dairy. Prior to the acquisition, Philadelphia Dairy, and its wholly owned subsidiaries, processed and distributed fluid milk and allied dairy products, including ice cream, in Pennsylvania, New York, New Jersey, Delaware, Maryland, and Northern Virginia. The record shows that, in 1953, Philadelphia Dairy, and its subsidiaries, operated the following processing and distribution plants:

Ice Cream Manufacturing and Distributing Plants
Philadelphia, Pa.
Wilkes-Barre, Pa.
Dushore, Pa.
Richmond, Va.

Ice Cream Distributing Stations
Allentown, Pa.
Harrisburg, Pa.
Lebanon, Pa.
Pottstown, Pa.
Sayre, Pa.
Scranton, Pa.
Williamsport, Pa.
Monticello, N.Y.
Portville, N.Y.
Asbury Park, N.J.
Atlantic City, N.J.
Bergenfield, N.J.
Newark, N.J.
Trenton, N.J.
Laurel, Del.
Wilmington, Del.
Waynesboro, Va.

Milk Manufacturing Plants
Scranton, Pa.
Dushore, Pa.

Fluid Milk Creameries
Benton, Pa.
Fairdale, Pa.
Leraysville, Pa.
Rushville, Pa.
York Springs, Pa.
Unionville, N.Y.
Delaware, N.J.
Clayton, Del.
Snow Hill, Md.

Milk Processing and Bottling Plants
Philadelphia, Pa.
Ardmore, Pa.
Allentown, Pa.
Scranton, Pa.
Wilkes-Barre, Pa.
Gloucester, N.J.
Hoboken, N.J.
Richmond, Va.

Milk Distributing Stations
Darby, Pa.
Brooklyn, N.Y.
Staten Island, N.Y.
Newark, N.J.
Carlstadt, N.J.

In 1954, Philadelphia Dairy and its subsidiaries had net sales of approximately $48,000,000, with a net income of approximately $1,200,000, and total assets of approximately $22,000,000. Said sales were distributed in the various locations in the following amounts:

FLUID MILK

Locations	*Gallons*
Philadelphia Dairy:	
45th Street	4, 174, 393
Ardmore	1, 038, 260
Darby	1, 784, 965
Gloucester	1, 111, 151
Allentown	810, 413
North Philadelphia	1, 630, 203
	10, 549, 385

Locations	*Gallons*
Janssen Dairy:	
Brooklyn	1, 999, 614
Carlstadt	844, 841
Hoboken (Grand St.)	2, 566
Hoboken (Jefferson St.)	1, 772, 227
Newark	1, 167, 347
Staten Island	1, 145, 678
	6, 932, 273
Richmond Dairy	4, 387, 227
Woodlawn Farm Dairy:	
Scranton	2, 447, 003
Wilkes-Barre	2, 494, 957
	4, 941, 960
Total	26, 810, 845
ICE CREAM	
Philadelphia Dairy:	
Philadelphia	1, 932, 555
Trenton	329, 358
Laurel	277, 098
Bergenfield	552, 659
Atlantic City	176, 494
Asbury Park	187, 314
Pottstown	420, 932
Lebanon	120, 971
Wilmington	315, 538
Allentown	391, 731
Harrisburg	347, 009
Monticello	142, 286
Newark	1, 211, 020
	6, 404, 965
Harrington Dairy:	
Dushore	137, 616
Portville	170, 313
Sayre	192, 245
Williamsport	194. 513
	694, 687

Locations	*Gallons*
Richmond Dairy:	
Richmond	408, 387
Richmond-Eskimo	467, 308
Waynesboro	115, 221
	990, 916
Woodlawn Farm Dairy:	
Scranton	332, 139
Wilkes-Barre	395, 722
	727, 861
Total	8, 818, 429

Prior to the acquisition, Foremost operated an ice cream plant in Brooklyn, New York, which had sales in 1954 of 330,225 gallons. The Philadelphia Dairy plant, selling in that same area had, in 1954, sales of approximately 531,012 gallons.

(b) Market Conditions.

Respondent was in competition in only one area with Philadelphia Dairy prior to the date of the acquisition. As hereinabove indicated, this was the area served from Foremost's small ice cream plant in Brooklyn, New York, which distributed to customers located in the five boroughs of New York City, and the remaining counties of Long Island. Philadelphia Dairy also distributed ice cream from its Bergenfield and Newark, New Jersey, branches in that area. In February 1955, the Brooklyn plant of Foremost was closed. Sales in the New York City-Long Island area were thereafter made from the Philadelphia Dairy, Newark and Bergenfield, New Jersey, plants. According to the figures in the record, the volume of the combined sales of Philadelphia Dairy and Foremost in the above referred to area, in 1954, was 861,237 gallons. Since the acquisition, the volume of Foremost's sales in that same area has declined to 677,068 gallons in 1957. There is no evidence in the record indicating the total volume of ice cream sales in the area served both by Foremost and Philadelphia Dairy prior to the acquisition.

Other than as to its home market, Philadelphia, where approximately one-third of all of its fluid milk was sold, the record does not contain evidence showing the market and other facts necessary to evaluate the effect upon competition of the Philadelphia Dairy acquisition. In the Philadelphia market, which has been regulated under a Federal Milk Market Order Program for a number of years, the market share of the Philadelphia Dairy, at the time of the acquisition, was 9.3%, which share increased to approximately 10% in 1958. The principal competitors of Philadelphia Dairy, in the Philadelphia market at the time of the acquisition, were Supplee Milk and Ice Cream Co., in fluid milk, and Breyer Ice Cream Co., in ice cream, both subsidiaries of National Dairy; Abbott's Dairy, a large independent concern; and the third largest competitor in the sale of fluid milk was probably Harbisons Dairies, another "independent."

6. *American Dairies, Inc., a Maryland Corporation, with Principal Office in Kansas City, Missouri.*

(a) The Acquisition.

On October 1, 1954, Foremost acquired the outstanding capital stock of American Dairies, Incorporated (sometimes hereinafter referred to as American Dairies), for approximately $7,000,000 in cash. Included in this acquisition were fourteen wholly owned subsidiaries of American Dairies which were engaged in the processing and sale of fluid milk at wholesale and at home delivery retail, and/or in the manufacture and sale of ice cream, butter, cheese, and cottage cheese. The names of these subsidiaries, their location, and the products produced or sold are set forth as follows:

MANUFACTURING SUBSIDIARIES

State and city	*Name of company*	*Products*
ARKANSAS		
Greenwood	Community Crmy. Co. of Arkansas, Inc.	Cheese
Ozark	Ozark Crmy. Company, Inc.	Cheese-Cond.-Swt. Crm.
Paragould	Tastemark Dairy Co.	Milk (I.C. Dist. Only)
Waldron	Community Creamery Co. of Ark., Inc.	Cheese
KANSAS		
Hutchinson	The Meriden Creamery Co., Inc.	Buttery
Kansas City	DeCoursey Creamery Co.	Ice Cream
Leavenworth	DeCoursey Creamery Co.	Cream, Cottage Cheese, Butter, Milk, Ice Cream
Pratt	Pratt Dairy Products Co.	Cheese
MISSOURI		
Joplin	Community Dairy Products Co.	Cottage Cheese, Butter, Milk, Ice Cream
Kansas City	Aines Farm Dairy Co.	Cream, Chocolate Milk, Cottage Cheese, Milk
Kansas City	American Butter Company [1]	Butter
Kansas City	Arctic Dairy Products Co.[1]	Cheese, Milk (Dist. Only), Ice Cream
Kansas City	The Meriden Creamery Co.[1]	Cream, Butter
Springfield	Patton Creamery Co.	(Butter-Dist. Only), Milk, Ice Cream
Windsor	Tastemark Foods, Inc.	Cheese-Condensed

[1] No plant facilities; company is a trade name only, offices located in Kansas City, Missouri.

DISTRIBUTING SUBSIDIARIES

State and city	*Name of company*	*Products*
ARKANSAS		
Harrison	Patton Creamery Co.	Milk, Ice Cream
Springdale	Patton Creamery Co.	Milk, Ice Cream
MISSOURI		
Brookfield	Arctic Dairy Products Co.	Ice Cream
Maryville	Arctic Dairy Products Co.	Ice Cream
Rolla	Patton Creamery Co.	Milk, Ice Cream
West Plains	Patton Creamery Co.	Milk, Ice Cream
WASHINGTON, D.C.		
	Carlin Creamery Co.	Cheese, Butter
	W. F. Huhn & Co.	Cheese, Butter
KANSAS		
Salina	DeCoursey Creamery Co	Ice Cream

In the year ended March 31, 1954, American Dairies and its subsidiaries had net sales of approximately $24,000,000, with a net profit, after taxes, of approximately $740,000, and a net worth of approximately $6,700,000.

The above sales were accounted for as follows: market milk products, approximately 11,781,000 gallons; cottage cheese, 2,601,000 lbs.; ice cream, 2,833,000 gallons; butter, 9,759,000 lbs.; cheese, 5,730,000 lbs.; margarine, 1,831,000 lbs.; and manufacturing milk, 2,446,000 lbs.

The subsidiaries of American Dairies distributed fluid milk and ice cream through the following routes in August 1954:

MILK

	Wholesale	Retail E.O.D.	Ice cream
DeCoursey Creamery Comapny:			
Kansas City, Kanasas			9
Leavenworth, Kansas	6	8	1
Salina, Kansas			3
Patton Creamery Company:			
Springfield, Missouri	16		4
Arctic Products Company:			
Kansas City, Missouri	4		8
Maryville, Missouri			2
Brookfield, Missouri			1
Aines Farm Dairy Company:			
Kansas City, Missouri	24	156	
Community Products Company:			
Joplin, Missouri	14		3
Tastemark Dairy Company:			
Paragould, Arkansas	17		2
Total	81	164	33

(b) Market Conditions.

The only evidence in the record with respect to the markets served by American Dairies and its subsidiaries, other than the foregoing tables, consists of the Federal Milk Market Order figures introduced by respondent as to the Neosho Valley Order area served by the subsidiary, Community Dairy Products Co., Joplin, Missouri. Within that area, including the Kansas Counties of Allen, Bourbon, Cherokee, Crawford, Labette, Montgomery, Neosho, and Wilson, and the Missouri Counties of Barton, Jasper, Newton, and Vernon, respondent's share of the area sales rose substantially between 1954 and 1957, when they levelled off, the percentages of which are as follows:

1954—16.4%
1955—18.2%
1956—22.5%
1957—25.7%
1958—25.9%
1959—25.9%

It is urged by counsel for respondent, in their proposed findings, that the record fails to establish that the acquisition of American Dairies, representing respondent's entry into areas wholly new to it, had any adverse effect upon competition, and further, that the evidence failed to prove that, because of respondent's over-all size and growth, this acquisition had, or has, any reasonable probability of substantially lessening competition. On the other hand, it is contended, by counsel supporting the complaint, that the metropolitan areas surrounding the cities where the manufacturing and distributing subsidiaries of American Dairies operate, constitute the section of the country where the acquisition of American by Foremost has had an adverse effect upon competition in each of the lines of commerce indicated in the foregoing paragraphs.

It is not believed that there is sufficient evidence in the record to support a finding that the acquisition of American Dairies has a probable tendency to lessen competition, or tends to create a monopoly in any section of the country. This is not a horizontal acquisition, since respondent, Foremost, had never sold any of the products handled by American Dairies, in any of the areas served by American Dairies, prior to the acquisition. There is no evidence with respect to market shares, or who the competitors of American Dairies were at the time of the acquisition; nor is there any evidence as to the probable effect of the acquisition upon any competition which may have theretofor existed, or upon competitors which engaged in a similar line of business in the respective areas.

In view of the above, and for reasons which will be more fully discussed in the conclusions herein, it is found that there has been no substantial lessening of competition, or tendency to create a monopoly growing out of the acquisition of American Dairies by Foremost.

7. *The DeSoto Ice Cream Division of Armour and Company, Minneapolis, Minnesota.*

(a) The Acquisition.

On August 9, 1954, Foremost acquired certain assets of the DeSoto Ice Cream Division of Armour and Co., in Minneapolis, Minnesota (sometimes hereinafter referred to as DeSoto), for approximately $362,000. No manufacturing plant was involved in the acquisition, but there were included more than 400 ice cream cabinets used in the business, and two distribution points, one in Minneapolis, Minnesota, and one in Mobridge, South Dakota. The assets of DeSoto, as of June 5, 1954, amounted to approximately $335,000 in the Minneapolis location, and $78,000 in the Mobridge, South Dakota location.

Prior to the acquisition, DeSoto had ice cream sales of approximately 235,000 gallons a year, with an additional novelty business, including the Eskimo Pie franchise, of 260,000 gallons a year. The Eskimo Pie franchise was exercised through jobbers in the States of Wisconsin, Minnesota, and North and South Dakota.

(b) Market Conditions.

Foremost had made its initial entry into the Minneapolis area in the manufacture and sale of ice cream by the acquisition of the Ives Ice Cream Company, on May 31, 1954. Prior to that acquisition, Ives was engaged in the manufacture and sale of ice cream in the Minneapolis area, with distribution branches in St. Cloud, Brainerd and Fergus Falls, Minnesota. Subsequent to the DeSoto acquisition, its assets were combined with the Ives operation in Minneapolis. Ives volume of sales of ice cream, in Minneapolis, was approximately 300,000 gallons annually. The record does not show the volume of sales of DeSoto in the Minneapolis area alone, the DeSoto sales being spread over a wide area, including parts of Minnesota west of Minneapolis, and Mobridge, South Dakota. The only evidence of other ice cream manufacturers located in the area surrounding Minneapolis, or Mobridge, consists of testimony of officials of Foremost who estimated that there were about twelve to fifteen ice cream manufacturers located in the combined Minneapolis-St. Paul area, and that the position of the acquired companies, combined, could not have been higher than fourth in that area, with a small percentage of the total volume sold. This would include the business of a firm known as Vander-Bie's, Inc., of St. Paul, which was acquired by respondent in

August 1954, but which was not engaged in interstate commerce. There is not sufficient evidence in the record upon which to base a finding as to an adverse competitive effect upon competition as a result of the acquisition of the DeSoto Ice Cream Division of Armour and Company, even when considered with the acquisition of the Ives Ice Cream Company, in May 1954.

8. *Bridgeman-Russell Company, Inc., a Minnesota Corporation, Duluth, Minnesota.*

(a) The Acquisition.

By an agreement dated October 8, 1952, Foremost acquired the outstanding capital stock of Bridgeman-Russell Company, Inc. (sometimes hereinafter referred to as Bridgeman-Russell), by exchanging two and one-quarter shares of its common stock, and one and one-quarter shares of its preferred stock for each outstanding share of the Bridgeman-Russell stock. At the same time, Foremost also acquired four wholly owned subsidiaries of Bridgeman-Russell, namely, the Minot Creamery Company, a North Dakota corporation, located at Minot, North Dakota, where it had a butter plant; Purity Dairy Company, a North Dakota corporation, located at Mandan, North Dakota, where it operated a fluid milk, ice cream and butter plant; United Dairies, Inc., a Minnesota corporation, located at Duluth, Minnesota; and Dairyland Creamery Company, a South Dakota corporation, located at Sioux Falls, South Dakota, where it had a fluid milk and ice cream plant.

Prior to the acquisition, Bridgeman-Russell operated combination fluid milk and ice cream plants at Duluth, Minnesota, and Jamestown, North Dakota (where it also processed butter); and a processing plant for fluid milk at Virginia, Minnesota. In addition, it had distribution branches for fluid milk, ice cream and butter at Ashland, Wisconsin, and Carrington, North Dakota.

Its principal sales of fluid milk, ice cream and butter were made at wholesale in the following sales areas: Duluth and Virginia, Minnesota; Jamestown, North Dakota; and Hancock, Michigan.

In 1951, Bridgeman-Russell had consolidated net sales of approximately $11,375,000, total assets of approximately $3,069,000, and net income of approximately $102,000. Of the total consolidated net sales, approximately $3,255,000 was in fluid milk, $2,210,000 in ice cream, and the balance in butter, poultry, meats, frozen foods, eggs and cheese jobbing.

Dairyland Creamery Company, a wholly owned subsidiary of Bridgeman-Russell, accounted for approximately $340,000 of the above ice cream sales, and approximately $225,000 of the fluid milk sales. Its sales were made in the Sioux Falls, South Dakota, area, at wholesale only.

Purity Dairy Company, another wholly owned subsidiary, accounted for approximately $281,000 of the above ice cream sales and approximately $530,000 of the fluid milk sales, such sales being in the Mandan and Bismarck, North Dakota, areas.

Another wholly owned subsidiary, United Dairies, Inc., with wholesale and home-delivery retail fluid milk sales of approximately $1,239,000 in the Duluth, Minnesota, area accounted for the balance of the above total fluid milk sales.

Minot Creamery Company, another wholly owned subsidiary, manufactured butter at Minot, North Dakota, and sold substantially all of its products to the parent company.

(b) Market Conditions.

Prior to the acquisition, Foremost was not in competition with Bridgeman-Russell or any of its subsidiaries. The record contains no evidence of market conditions in any of the markets where Bridgeman-Russell Company sold its products, with the exception of testimony of officials of the respondent. Mr. Herbert L. Nordal, the former President and General Manager of Bridgeman-Russell, and later a Division Manager for Foremost, now retired, testified that the main competitors of Bridgeman-Russell in Duluth, Minnesota, were four major co-op organizations, namely: Land O'Lakes Creamery of Minneapolis; Twin Ports Creamery of Superior and Duluth; Arrowhead Cooperative, with headquarters in Duluth; and Floodwood Creamery at Floodwood, Minnesota, which is forty miles northwest of Duluth; that these four cooperatives were in competition with Bridgeman-Russell in both fluid milk and ice cream in the Duluth area; that Land O'Lakes not only sold ice cream at wholesale, but also sold through a number of retail stores known as the Bridgeman stores, selling both milk and ice cream. In 1957, during the course of the hearings, he testified that the principal, or the largest, seller of fluid milk in the immediate Duluth area was Twin Ports. He rated Bridgeman-Russell, or the Foremost operation in Duluth, fourth or fifth in fluid milk, and probably second or third in the sale of ice cream. In addition, he said there are about a dozen small distributors in the Duluth area. He named other distibutors in the area around Ashland, Wisconsin, as Beatrice and Sealtest. In the North Dakota area, Jamestown, Mandan and Minot, he listed the Fairmont Creamery Company and the Mandan Creamery, and also a cooperative in that area which he identified as Equity Union Co-op of Aberdeen, South Dakota.

With respect to the Sioux Falls operation, he testified that Dairyland Creamery, a subsidiary of Bridgeman-Russell, sold fluid milk and ice cream in Sioux Falls in competition with Crescent Creamery Company, later acquired by Foremost.

There is not sufficient evidence in the record upon which to base a finding as to an adverse effect upon competition in any of the areas where Bridgeman-Russell did business, as the result of its acquisition by Foremost.

9. *Crescent Creamery Co., a South Dakota Corporation, Sioux Falls, South Dakota.*

(a) The Acquisition.

Pursuant to an agreement dated August 26, 1953, Foremost acquired all of the capital stock of Crescent Creamery Co. (sometimes hereinafter referred to as Crescent), together with all of the capital stock of Sunny Side Dairy, Inc., and Frosted Lockers, both South Dakota corporations, in a stock exchange for the common and preferred stock of Foremost. Included in the acquisition were two wholly owned subsidiaries of Crescent, Hawarden Dairy, Inc., an Iowa corporation, located at Hawarden, Iowa, and Bell's, a South Dakota corporation which operated a retail store in Sioux Falls, South Dakota.

Prior to the acquisition, Crescent was engaged in the processing and distribution of fluid milk at wholesale and home-delivery retail, and the manufacture and sale of ice cream in the Sioux Falls, South Dakota, area. The wholly owned subsidiary, Hawarden Dairy, Inc., with a fluid milk plant located in Hawarden, Iowa, distributed fluid milk, ice cream, butter and cottage cheese, all of which, except fluid milk, it received from its parent, Crescent Creamery, in the Hawarden, Iowa, area. Prior to the acquisition, the total assets of Crescent Creamery and its subsidiaries were approximately $497,000, with a net worth of approximately $348,000.

(b) Market Conditions.

At the time of the acquisition of Crescent, Foremost was operating Dairyland Creamery, in Sioux Falls, which it had acquired in 1952 as a part of the assets of Bridgeman-Russell, hereinbefore mentioned. After the acquisition, the Dairyland and Crescent operations were consolidated in the Crescent Plant, which continued as the Foremost plant in Sioux Falls. It was estimated that the combined operation accounted for about 25% of the total ice cream sales and 30% of the fluid milk sales in the Sioux Falls area in 1957.

When Foremost acquired Crescent, in 1953, there were four other concerns competing in the Sioux Falls fluid milk market. They were: Lakeside, Guernsey, Terrace Park, and North American

Creameries. The last-named concern had entered the market from its plant in Paynesville, Minnesota, approximately 150 miles away. In 1954, the year after the acquisition, North American was sold to Fairmont Food Company which has continued to sell at wholesale in the Sioux Falls market. The Guernsey Dairy came into the Sioux Falls area in 1947, and had a processing plant in the suburbs of Sioux Falls, selling both at wholesale and retail in the Sioux Falls market. It sells some milk to two supermarket chains in Sioux Falls, National Food Stores and Super Value Stores.

The Lakeside Dairy also had a processing plant in Sioux Falls, and engaged in both wholesale and retail distribution. In 1958, it enlarged its plant and has expanded its operations. It sells its milk to most of the stores of the supermarket chains in the Sioux Falls area, including the Sunshine Stores, the Piggly-Wiggly supermarkets and Super Value Stores.

Terrace Park has a processing plant in Sioux Falls, and has continued to expand its operations since the date of acquisition of Crescent by Foremost in 1953, not only in Sioux Falls proper, but principally in the surrounding territory in South Dakota, southern Minnesota, and northwestern Iowa. It supplies all of the supermarket chain stores in Sioux Falls, except two of the five Sunshine Stores.

There are approximately twenty to forty chain supermarket stores in the Sioux Falls area, which has a population of about 65,000. Most of the chain stores in the Sioux Falls area carry at least three brands of milk, and some have four. The dairy that makes the original contact and distribution in these chain stores is the one that usually gets the larger space for display. Foremost milk is in most of the chain stores in Sioux Falls and usually shares the space equally with the other leading brands, Lakeside and Terrace Park. Some exceptions may be found in some of the stores in the surrounding area where, since the acquisition of Crescent, it has established distribution points, including Mitchell, Huron, Webster, Flandreau, Pierre and Beresford, South Dakota; and Worthington, Minnesota.

There is evidence in the record indicating that a cooperative organization known as the Equity Union, which did business in Aberdeen, South Dakota, from which it made distribution in Mitchell and Jamestown, and later in Madison, South Dakota, attempted to get into the Sioux Falls market, and were there about six months and were not successful and pulled out. Mr. Homer J. Lyon, District Manager in the South Dakota area for Foremost, testified as to the reason Equity pulled out of Sioux Falls: "failed to get their product moving off the shelves of the stores they got into." He also testified that Equity has been trying to sell out to Foremost.

In Sioux Falls, Foremost has a fluid milk plant with a daily capacity of 7,000 gallons of milk in an eight-hour day. In 1958 it spent approximately $27,000 for local advertising in the area served by its Sioux Falls plant.

The only sales figures in the record which would show the relative position or market share of Foremost in this general area at the time of the acquisition, or as a result of the acquisition of Crescent, indicate that the total fluid milk sales of Foremost for the year 1953 was 9,072,746 pounds, which was 40.2% of the total fluid milk sold in the Sioux Falls-Mitchell Federal Milk Marketing Area. At that time, Foremost was not selling in the Mitchell market, so that the universe figures for the Sioux Falls-Mitchell area, taken from the Federal Milk Order, do not give an accurate picture of the situation at the time of the acquisition in that it would appear that Foremost would have had an even larger market share in the Sioux Falls area alone.

From the foregoing facts, it is found that the acquisition of Crescent Creamery Company by Foremost, it already having a dairy business in the Sioux Falls, South Dakota, area, may have the effect of substantially lessening competition and tending to create a monopoly by Foremost in the fluid milk market in that section of the country which may be described as the Sioux Falls, South Dakota, market. It is certain that, as a result of the acquisition of Crescent, Foremost was placed in a much better competitive position than it occupied prior to the acquisition. It and two other independent dairies, Lakeside Dairy and Terrace Park Dairy, have the majority of the chain store supermarket business. That is to say, these three dairies sell in a majority of the chain store supermarkets, with the bulk of the store shelf space in those stores. The record does not show which of these three has the largest distribution in those chain stores. The combined economic power of the respondent, with these two other companies, is indicated by the inability of the Equity Union Creameries, the cooperative from Mitchell and Aberdeen, and other points outside of Sioux Falls, to break into the Sioux Falls market because of its inability to get a share of the shelf space in the leading chain stores, the shelf space occupied for the most part by Foremost, Terrace Park and Lakeside.

The evidence submitted by counsel for the respondent as to the Mitchell area, in the study of the competitive situation in the market, is irrelevant and immaterial because Crescent was not in the Mitchell market at the time it was acquired. It only got in there as a result of expansion subsequent to the acquisition. Consequently, all the testimony in the record with respect to competitive conditions in the Mitchell market, and the other markets outside of Sioux Falls except Hawarden, Iowa, must be disregarded.

10. *Portsmouth Pure Milk Company, an Ohio Corporation, Portsmouth, Ohio, and Pure Milk Company, Inc., a Kentucky Corporation, Ashland, Kentucky.*

(a) The Acquisition.

In November 1954, Foremost acquired certain assets of Portsmouth Pure Milk Company and Pure Milk Company, Inc. The consideration paid was $25,000 in cash and 5,000 shares of Foremost common stock. After the acquisition, Foremost began to supply Portsmouth from the Ashland plant with both milk and ice cream. In the spring of 1956, respondent sold the Portsmouth milk business to a local competitor.

(b) Market Conditions.

There is no evidence as to the size of these acquisitions, the character of their markets, or the nature and extent of the competition with respect to either the Portsmouth or Ashland locations. It is contended by counsel for the respondent that competition increased in that area to such an extent that respondent had to abandon its Portsmouth milk business.

11. *Old Hundred, Inc., a Connecticut Corporation, Southbury, Connecticut.*

(a) The Acquisition.

By an agreement dated August 21, 1953, Foremost acquired the outstanding capital stock of Old Hundred, Inc., located at Southbury, Connecticut, for 18,181 shares of Foremost's common stock and 8,000 shares of its preferred stock, plus $120,000 in cash. Prior to the acquisition, Old Hundred was engaged in the manufacture and sale of ice cream in the Southbury, Connecticut, area. Its plant there had a capacity of approximately 2,000,000 gallons of ice cream a year, and the plant was operating at close to capacity. In 1952, the year before the acquisition, Old Hundred had sales of approximately $2,300,000; total assets of approximately $817,000; and net profit for that year of approximately $128,000. It sold its ice cream principally to the A & P stores and First National stores in that area.

(b) Market Conditions.

There is no evidence in the record with respect to the nature and extent of the market, or the competitive conditions in the ice cream business in and around Southbury at the time of the acquisition of the Old Hundred Company. Consequently, no finding can be made as to the competitive effect of this acquisition.

12. *Moanalua Dairy, Ltd., and Rico Ice Cream Company, Ltd., Hawaiian Corporations, Honolulu, Oahu, Hawaii.*

(a) The Acquisition.

On October 29, 1953, Foremost acquired from Hawaii Dairy Industries, Ltd., the outstanding capital stock of Moanalua Dairy, Ltd., and Rico Ice Cream Company, Ltd., for 25,657 shares of Foremost common stock valued at $564,456.

Prior to the acquisition, Moanalua was engaged in the processing and sale of fluid milk in the City of Honolulu; and Rico was engaged in the manufacture and sale of ice cream in the same area. Moanalua had a fluid milk plant, processing about 1,500 gallons a day. Its sales for the first six months of 1953 amounted to $871,000, on which it showed a loss of approximately $24,000. It had at that time a deficit of about $3,000. Rico's annual volume of ice cream was approximately 100,000 gallons a year. Prior to the acquisition of Moanalua and Rico, Foremost had entered Hawaii by the acquisition of the Campos Dairy Products, Ltd., hereinbefore mentioned in connection with the acquisition of International Dairy Supply.

(b) Market Conditions.

Subsequent to these acquisitions, the Moanalua milk operation was integrated with that of Campos Dairy Products, Ltd., and since that time Foremost has constructed a modern dairy plant from which it distributes fluid milk on the island of Oahu, which has a population of about 353,000 persons. The principal competitor of Foremost on the island of Oahu was Beatrice Foods, a well-known processor of milk in the United States. There were also four or five small dairies, and two ice cream competitors on the island. It is estimated by J. R. Lindley, Vice President of Foremost, that the combination of Campos and Moanalua gave Foremost approximately 30% of the fluid milk business on the island of Oahu. The acquisition of Moanalua and Rico by Foremost has a tendency to lessen competition and to create a monopoly in fluid milk and ice cream in the Honolulu market and throughout the island of Oahu.

13. *Widemire's, Inc., an Alabama Corporation, Sylacauga, Alabama.*

(a) The Acquisition.

On August 12, 1953, Foremost acquired Widemire's, Inc., located at Sylacauga, Alabama, in a transaction whereby Foremost acquired all of the outstanding capital stock of Widemire's for 5,807 shares of Foremost common stock and 2,555 shares of Foremost preferred stock.

Prior to the acquisition, Widemire's was engaged in the manufacture and sale of ice cream in the Sylacauga, Alabama, area, and also sold to the military installation at Ft. Benning, Georgia. It had previously had ice cream contracts with one or two military installations outside of Alabama.

(b) Market Conditions.

There is no evidence in the record as to the size of Widemire's, its market, its competitors, or any other proof relevant to the issues involved in this case.

14. *Southern Maid, Inc., a Virginia Corporation, Bristol, Virginia; and the Welch Milk Company, a West Virginia Corporaion, Welch, West Virginia.*

(a) The Acquisitions.

On September 16, 1952, Foremost acquired the outstanding capital stock of Southern Maid, Inc., located at Bristol, Virginia, and the Welch Milk Company of Welch, West Virginia, in the same transaction, for 16,000 shares of Foremost preferred stock and 45,000 shares of Foremost common stock.

Prior to the acquisition, Southern Maid was engaged in the processing and distribution of fluid milk at wholesale and home-delivery retail, and in the manufacture and sale of ice cream. Its principal sales areas were in and around Richlands, Bristol and Appalachia, Virginia; Bluefield, Union and Williamson, West Virginia; Johnson City and Kingport, Tennessee; and Middlesboro, Kentucky.

Prior to the acquisition, Welch Milk Company was engaged in the processing and distribution of fluid milk at wholesale and at home-delivery retail, and the manufacture and sale of ice cream. Its principal sales area were in and around McDowell, Wyoming and Logan Counties, West Virginia.

Southern Maid operated two combined milk and ice cream plants, one at Bristol, Virginia, and another at Bluefield, West Virginia, as well as a processing plant for milk alone at Kingsport, Tennessee, from which they made deliveries as outlined above. In addition to its sales at these plants, Southern Maid also operated distribution branches at Johnson City and Greenville, Tennessee; at Pikeville and Middlesboro, Kentucky; and at Richlands and Appalachia, Virginia. Welch operated a single plant, processing milk and manufacturing ice cream at Welch, West Virginia. It had no distribution points.

After the acquisition, Foremost continued to process milk at the Bristol, Welch and Kingsport plants, but not at the Bluefield plant, which became a distribution branch.

In 1951, Southern Maid had total sales of approximately $4,417,000, with total assets of approximately $1,246,000, and a net income of approximately $83,000.

Included in the above sales were sales of ice cream by Southern Maid with a value of approximately $694,000 in the Bristol, Virginia, Johnson City and Kingsport, Tennessee, areas, and fluid milk sales of approximately $1,400,000 in the same area. During the same period, Foremost had ice cream sales in Johnson City and Kingsport of $450,000, and fluid milk sales in that same area of approximately $863,000.

In 1951, Welch had net sales of approximately $1,693,000, and total assets of approximately $535,000, and net income of approximately $66,000.

(b) Market Conditions.

The record does not contain sufficient evidence to determine Foremost's and Southern Maid's share of the market in fluid milk or ice cream in the above area alone at the time of, or subsequent to, the acquisition. It does, however, contain sufficient evidence with respect to respondent's sales and the universe figures to determine its market share in fluid milk for the years 1956 through 1959 in an area somewhat larger, namely, that area covered by what is known as the Appalachian Federal Milk Order, the principal population centers in this area being Bristol, Kingsport and Johnson City, Tennessee, and Appalachia, Virginia. Such evidence indicates Foremost's share of the fluid milk market in this area for these four years to be:

1956—26.3%
1957—25.3%
1958—24.6%
1959—23.3%

Since the universe figures used in the computation of the above percentages cover an area considerably larger than the area served by the respondent, it would appear that the respondent's market share of the fluid milk market in the area served by it would be even larger than the percentages shown above.

An official of the respondent testified that its principal competitors in the general area referred to above were Pet Milk, Southern Dairies, Borden and perhaps Coble Dairy, located in Lexington, North Carolina.

A second relevant Federal Milk Order is the Bluefield Order which covered the territory including Welch and Bluefield, West Virginia, and Richlands, Virginia, all of which were supplied by plants or branches of Southern Maid, or by the Welch Milk Company prior to their acquisition. The Foremost share of the total sales in the Bluefield Order area for the years 1957 to 1959 was as follows:

1957—32.3%
1958—32.4%
1959—33.2%

The foregoing facts, while not conclusive, due to lack of volume of business of competitors in the market areas covered, indicate that there is a reasonable probability of the acquisitions substantially lessening competition in the sale of milk and ice cream in the sections of the country covered by the Appalachian and Bluefield Orders.

15. *Central Dairies, Inc., a South Carolina Corporation, Columbia, South Carolina.*

(a) The Acquisition.

Pursuant to an agreement dated February 13, 1951, Foremost acquired the outstanding capital stock of Central Dairies, Inc., located at Columbia, South Carolina, by an exchange of stock, whereby one share of Foremost common stock was exchanged for each two outstanding shares of Central Dairies stock.

Prior to the acquisition, Central Dairies was engaged in the manufacture and wholesale distribution of ice cream in the Columbia, South Carolina, area. For the year ended June 30, 1950, Central Dairies had net ice cream sales of approximately $168,000 and total assets of approximately $145,000. It showed a net loss for that year of approximately $5,900.

(b) Market Conditions.

In 1950, Central Dairies had 10% of the ice cream market in the Columbia, South Carolina, area. Foremost's initial entry into that area occurred in 1950, when it acquired the Bluebird Ice Cream Company, which had one retail store in Columbia, South Carolina, subsequently closed.

Foremost's sales of ice cream in the Columbia, South Carolina, trading area increased from approximately 228,000 gallons in 1952 to approximately 256,000 gallons in 1955. The sales of Central were made solely in and around Columbia, and the only way in which it was engaged in interstate commerce was in the purchase of certain raw materials from outside the State. At the time of the acquisition, the plant operated by Central was in difficulties because of an insurmountable sewerage problem, since the anticipated availability of city sewers did not materialize, and Foremost was compelled to stop manufacturing at the Central plant and supply the area from other sources. In view of the size, character and questionable future of this acquired corporation, it is concluded that there was not sufficient effect upon the relevant market to make a finding as to the competitive significance of this acquisition.

16. *Gunn Ice Cream Company, a Florida Corporation, Pensacola, Florida.*

(a) The Acquisition.

On March 1, 1952, Foremost purchased various assets of the Gunn Ice Cream Company of Pensacola, Florida, not including real estate, for $128,125. The acquisition included four ice cream route trucks, 180 ice cream cabinets, and other personalty of the Gunn Ice Cream Company. Foremost then leased the Gunn plant for $200 a month. In 1950, the volume of business done by Gunn in ice cream was approximately $140,000. The ice cream was sold in Pensacola and the surrounding counties of Santa Rosa, Escambia, Okaloosa and Walton, with some sales in nearby Alabama. Capacity of the Gunn plant was approximately 3,000 gallons per day, but it did not operate at full capacity throughout the year. After acquisition, the plant was converted to a distribution branch supplied with ice cream, first from respondent's Jacksonville plant, and then from Sylacauga, Alabama. Milk supplied from the Tallahassee plant was also added to this branch operation.

(b) Market Conditions.

Estimates were introduced in support of the complaint attributing 20% of the ice cream market served by the Gunn Ice Cream Company prior to the acquisition, namely, Chipley, Pensacola, Panama City and Marianna, to Gunn, and 5% to respondent. It is contended by counsel for the respondent, and it is apparent their contentions are sound, that Chipley and Marianna are small towns, 110 and 130 miles, respectively, northeast of Pensacola, and Panama City is 100 miles southeast of Pensacola. These markets were not a part of the Gunn trading area, and not a part of the common market of Pensacola. Foremost did not sell ice cream in Pensacola, or the remainder of Gunn's real trade area prior to the acquisition. There is no evidence in the record to indicate who the competitors were in that market. In any event, the transaction is de minimis and no finding is made as to the effect upon competition in that area.

17. *Graham's Dairy, Inc., a Florida Corporation, Miami, Florida.*

(a) The Acquisition.

On March 6, 1952, Foremost purchased certain assets, not including the plant, of Graham's Dairy, Inc., located in Miami, Florida, for $49,700, and agreed to purchase 550,000 gallons of raw milk per year from the seller. Graham continued as a producer, supplying Foremost in that area. It sold a certified, high quality, premium price raw milk which was not pasteurized but bottled under strict health supervision. Florida regulations require that a dairy selling certified milk, bottle all of its milk on the farm where it is produced.

(b) Market Conditions.

Graham's volume was approximately 1,200 to 1,300 gallons of fluid milk per day, and its sales in 1950 amounted to approximately $558,000. After the acquisition, Graham's business was integrated with that of the plant owned and operated in Miami by the respondent at the time of the acquisition.

In 1950, respondent's sales of fluid milk in the Miami area amounted to approximately $1,550,000, which sales amounted to about 8% of the Miami market, while Graham's amounted to about 3%. In view of the fact that, during this same year, just prior to the time of this acquisition, the leading distributors of fluid milk in the Miami area were Borden and McArthur, each with 20% of the fluid milk market in that area; Home Milk with 18%; and Land O'Sun with 10%, it is concluded that the acquisition of Graham's would not have sufficient competitive impact upon the Miami fluid milk market to give Foremost a decisive competitive advantage.

18. *Banner Dairies, Inc., a Texas Corporation, Abilene, Texas.*

(a) The Acquisition.

On May 28, 1953, respondent acquired all of the outstanding capital stock of Banner Dairies, Inc., Abilene, Texas (sometimes hereinafter referred to as Banner), in exchange for 21,525 shares of Foremost common stock and 24,610 shares of Foremost preferred stock. Included in the transaction were five affiliated subsidiaries which held title to, and in turn leased to Banner, real and personal property used in its milk and ice cream business. With this acquisition, Foremost obtained milk processing plants located at Abilene, Brownwood, Midland and San Angelo, Texas; an ice cream manufacturing plant at Abilene; combination milk and ice cream distribution branches at Odessa, Big Spring and Eastland, Texas; and milk distribution points at Haskell, Hamlin and Coleman, Texas.

In 1952, Banner had fluid milk sales of approximately $2,790,400 and ice cream sales of $642,700. In addition to fluid milk and ice cream, Banner also sold cottage cheese and butter.

(b) Market Conditions.

After the acquisition, Foremost converted the processing plants at Midland, San Angelo and Brownwood to distribution points, supplied from Abilene, because the volume of the Banner plants at those points was insufficient to support costs unless concentrated in a single plant. Prior to the acquisition, Foremost was in competition with Banner at Abilene where it distributed ice cream from its Fort Worth factory.

Foremost first entered the Abilene market in 1946 when it acquired the Pangburn Ice Cream Company with plants in Forth Worth and Abilene. The 1952 combined ice cream sales of Banner and Foremost, in Abilene, amounted to approximately $750,000, about equally divided between the two concerns. Abilene, in 1959, was a city of approximately 70,000 people, and in 1953, probably had a population of 60,000.

It is not clear from the record just what other competitors were in the Abilene market at the time of the acquisition of Banner by Foremost. There are a number of chain stores in Abilene and Foremost milk is sold in all of them except one chain, the Safeway Stores, which apparently handle their own milk. At the time the testimony was taken in this case with respect to the Abilene market, in March 1960, there were eight companies competing for the fluid milk market in Abilene. Two of these compaines had processing plants in Abilene (Foremost and Borden), the latter having acquired a processing plant there about the same time that Foremost acquired Banner in 1953. Other companies selling milk at wholesale in the Abilene market and the approximate dates they entered the market are as follows:

Oak Farms has served Abilene customers with fluid milk from its Dallas plant, 180 miles away, since 1954, including its own affiliated stores known as "Seven-Eleven"; the two stores of the B & B Parkway Chain; the two stores of the Super-Duper Chain; and the four stores of the Thornton Super Market Chain.

Lamar Creamery has been selling fluid milk in Abilene only since 1956, transporting its milk from its Paris plant 295 miles away. It sells to all five stores of the "M" System Supermarket chain in Abilene.

Cabell supplies fluid milk to the Abilene market from its Dallas plant, and has been in that market since 1952. In 1960 it sold in that area entirely through its own "Minit Markets."

Borden has already been mentioned. It sells fluid milk both at retail and wholesale, and sells to the five stores of the "M" System Supermarket.

Metzger, an independent with plants in Dallas and San Antonio, entered the Abilene milk market from its Dallas plant about 1953. It sells fluid milk only to independent or individually owned stores. It has from time to time sold to some of the chain stores, but was unable to retain them as customers.

Gandy Creamery, from its processing plant in San Angelo, Texas, 95 miles away, entered the Abilene market about the same time that Foremost acquired Banner. It maintains a distribution branch in

Abilene from which it sells fluid milk at both wholesale and retail home delivery distribution. In addition to Abilene, it sells to customers in Big Spring and Odessa where Banner also sold prior to its acquisition. In Abilene, Gandy serves practically every chain store outlet, including the five Nabors drive-in stores located in the outskirts of the city, and is probably the second largest milk distributor.

Chain store fluid milk distribution in Abilene is divided as follows: Foremost serves 17 chain store supermarkets, as follows—M System Stores, 5; Thornton, 4; Furr, 2; A & P, 2 (now 1); B & B Parkway Stores, 2; Super-Duper, 2. The other distributors in the M System Stores are Gandy, Lamar and Borden. In the B & B Parkway Stores, Gandy and Oak Farms are competitors. In the two Super-Duper Stores, the competitors are also Gandy and Oak Farms. In the four Thornton Stores, Oak Farms is the competitor. In the Furr Food Stores, Gandy is the competitor. The only chains not served by Foremost are Safeway and the five Nabors drive-in stores. The record does not contain any evidence as to the volume of fluid milk business done by any of the competitors of Foremost, either in the retail or wholesale trade. However, it is quite apparent from the testimony of officials of respondent that in the Abilene market it had a distinct advantage over its competitors, Foremost milk being sold in more chain stores than any of its competitors. The only real independent, Metzger, has been unable to maintain chain store distribution. Except for Borden, all other Foremost competitors must ship milk from distant points, varying from 95 to 295 miles. The only competitor that has a processing plant in Abilene, the Borden Company, does not have the chain store distribution, its sales being confined to one chain of supermarkets.

19. *Tennessee Dairies, Inc., a Texas Corporation, Dallas, Texas.*

(a) The Acquisition.

On September 9, 1952, Foremost acquired all the outstanding capital stock of Tennessee Dairies, Inc., located in Dallas, Texas, paying therefor approximately 18,125 shares of Foremost common stock, 7,250 shares of Foremost preferred stock, and agreed to pay off debentures held by Tennessee stockholders in the amount of $101,000, or a total consideration of approximately $800,000.

Prior to the acquisition, Tennessee Dairies, Inc. (hereinafter sometimes referred to as Tennessee), was engaged in the processing and distribution of fluid milk at wholesale and at home-delivery retail in Dallas, Longview, Kilgore, McKinney Sherman, Waco, San Antonio, Terrell and Sulphur Springs, Texas; and in selling at its Dallas plant to distributors located at Odessa and Corpus Christi and at various towns in the Rio Grande Valley, Texas, who picked up the milk in their own trucks and distributed it in their own trade territories. It also sold a full line of other dairy products, including cottage cheese and butter.

In 1950, the Dallas Metropolitan area had a population of approximately 435,000; and in 1960, it had 660,000.

(b) Market Conditions.

1. As to Dallas.

In 1951, Tennessee had fluid milk sales in Dallas of approximately $4,332,000 and a total of fluid milk sales for the entire area, including sales to distributors, of approximately $6,529,000. In addition, it had sales of approximately $4,295,000 at its Dallas plant to distributors who picked up the milk at the plant in their own trucks.

Foremost's initial entry into the Dallas marketing area occurred in 1945 by the acquisition of Southwest Dairy Products Company which had an ice cream plant in Dallas. In 1950, Foremost had 10% of the ice cream business in the Metropolitan Dallas market area.

At the time of the acquisition, Tennessee operated approximately 70 retail milk trucks and 25 wholesale milk trucks in the Dallas market.

Prior to the acquisition, Tennessee did not sell milk either directly or through distributors in the Fort Worth market (about 35 miles from Dallas) where Foremost had a milk plant at the time of the acquisition. The only area in which Tennessee and Foremost were in competition was in the San Antonio market.

Respondent still supplies the Dallas milk market from the plant which it acquired from Tennessee in 1952. At the time the testimony was taken, in 1959, respondent was planning to move into a new plant constructed in Dallas. At the time of the acquisition, Tennessee sold to a number of supermarkets and chain stores, including the A&P, A–G, and Tom Thumb groups. Foremost has continued to sell its milk to all 33 A & P stores in Dallas. It also sells to all 5 Wrigley stores, and all 7 Worth Food Stores in Dallas. These are new chains which were not in Dallas at the time Tennessee was acquired. Foremost has lost some business in the Tom Thumb Stores, formerly sold by Tennessee, but it sold in 15 or 16 supermarkets of that chain at the time the testimony was taken in 1959. It also sells to 9 of the Minyard Stores and a number of other A–G Stores, as did Tennessee. Also, it sells to the 6 stores of the local Hodges chain and is the only supplier of those stores. Respondent does not sell to any of the Kroger Stores (Wyatt), 30 in number. In 1957, it was estimated that Foremost ranked third in the sale of fluid milk in the Dallas market area. The principal competitors of Foremost in the Dallas market area in 1959 were the following firms:

a. Schepp's, a local family-owned concern, is engaged in both wholesale and retail fluid milk distribution, and in selling to the Dallas public schools. It has been in Dallas for a number of years. There are no accurate figures with respect to the volume of milk business done by this firm, but it is estimated, by sales officials of the respondent, that it is approximately 8,000 gallons a day. It sells its milk to the A–G (Associated Grocers), and Cliff Chains. It advertises in radio, television and newspaper media. It recently acquired another local milk company, Triangle Dairy.

b. Metzger is another local concern in Dallas, operating processing plants in Dallas and San Antonio. It has been in business in Dallas for many years, selling its fluid milk at wholesale and retail. Although there is no accurate information as to the volume of business done by this firm in Dallas, it is estimated by the same officials of the respondent as being approximately 17,500 gallons a day. In Dallas, it sells milk to all the stores of the Minyard chain; all of the stores in the TomThumb chain; more than half of the stores of the Worth Food chain; some of the stores of the A & P chain; and some of the stores of the A–G chain.

c. Bluff View is a small single-plant, family-owned milk company, engaged primarily in retail home delivery distribution, but with some restaurant accounts in Dallas. It has been in business for a number of years and specializes in Guernsey milk.

d. Beverly Hills Dairy is another small dairy, engaged both in wholesale and retail distribution, selling fluid milk to stores primarily in glass gallon jugs. It formerly sold a full line, but recently has concentrated on the large size container.

e. Oak Farms, a wholly owned subsidiary of Southland Corporation, is reputed to be the largest independent dairy in Texas. It now operates processing plants in Dallas, Fort Worth and Houston and has a number of branches in other markets. It was established in the early 1930's, with its original plant in Dallas. It sells fluid milk only at wholesale and to the Dallas school system in Dallas, but it engages in retail home delivery distribution in Fort Worth and Houston and some smaller markets in East Texas. In recent years, it has extended its distribution to a number of cities outside of the Dallas market area, including Sherman, Sulphur Springs, Longview, Waco, San Antonio, Abilene, Lubbock, Odessa and Big Spring. It is estimated that it operates 32 milk routes in Dallas, with an estimated gallonage of 40,000 gallons a day between its Dallas and Fort Worth plants. It actively advertises, employing billboards, dealer signs, radio, newspaper and television, and owns and operates a chain of

"Seven-Eleven" drive-in supermarkets. It carries, in addition to milk, such items as bread, canned goods, and similar items. It is estimated that there are about 75 to 100 such stores in the Dallas area. It sells milk on a wholesale basis to a number of supermarkets in Dallas, including 30 A & P Stores, 5 stores of the Wrigley Supermarket chain, some of the 15 or 16 Tom Thumb Supermarkets, and many of the A–G Stores.

f. Another milk distributor in Dallas is Cabell's, which has operated a processing plant in Dallas since early in the 1930's. It originally sold milk only at wholesale, but a few years ago it began retail distribution, and it also sells to the Dallas schools. It has extended its distribution to surrounding towns in recent years, including Big Springs, Abilene, Midland and Odessa in the West, and Tyler and Longview in East Texas. It is estimated that its volume of gallonage in the Dallas area is 24,000 gallons per day. It also, like Oak Farms, has a chain of its own drive-in supermarkets known as Cabell "Minit Markets." At the time testimony was taken, there were about 70 such markets, of which 32 were in the Dallas area. It also does a substantial milk business with other retail stores in the Dallas area, selling to 30 of the Wyatt Stores (part of the Kroger Chain), all 5 of the Wrigley Supermarkets and some of the 15 or 16 Tom Thumb Stores and to some of the A–G Stores.

g. The Jere Dairy, an individually owned and operated fluid milk plant in Grand Prairie, between Dallas and Fort Worth, started in business in 1956. It is engaged exclusively in wholesale milk distribution and has concentrated on the glass gallon jug line. It sells milk to some of the A–G Stores and a number of independent markets, particularly of the drive-in category which specialize in gallon jugs.

h. All-Jersey is a single plant milk company, individually owned, with its plant in Greenville, Texas, about 60 miles from Dallas. It began business in 1955 and sells milk at retail in the immediate neighborhood of its plant, but it also now has a wholesale milk business in Dallas. It sells to all of the Tom Thumb Supermarkets and advertises in Tom Thumb's advertisements in newspapers and on the radio.

i. Lamar Creamery, operating a single processing plant at Paris, Texas, 105 miles from Dallas, is owned by a milk producer cooperative association. It first began to distribute milk in Dallas about 1954, and since 1952 has extended its milk distribution in East Texas in the Beaumont, Houston and Port Arthur area, with some distribution in San Antonio and in Abilene, Sweetwater, Midland and Odessa in West Texas. It hauls its packaged milk in refrigerated trailer trucks to Dallas, where it is transferred to wholesale route trucks. It now operates about five of such trucks in Dallas. It supplies some of the A–G Stores and the three Branson Stores.

j. Borden has operated a milk processing plant in Dallas for many years, and is engaged in retail and wholesale milk distribution there, as well as selling to the Dallas school system. In Dallas, it sells to all of the Wrigley, A & P and Worth Stores, to one of the Minyard Stores, and to some of the A–G and Wyatt Stores. At one time it sold milk to the Tom Thumb Stores, but since those stores have been featuring the All-Jersey line, it is not doing so.

k. Vandervoort's is a long-established, family-owned dairy with its only fluid milk plant located in Fort Worth, where it engages in both wholesale and retail milk distribution. About 1955 it started to distribute milk in the Dallas market, where it now has a wholesale distribution throughout the city. Its retail operation, however, is limited to the west side of Dallas. In recent years it has extended its milk distribution to the surrounding area. It is estimated that its present volume is about 6,300 gallons per day. It advertises quite extensively, using television and radio.

l. Boswell of Fort Worth has been in business for a long time, and it is estimated that it is the largest milk seller in the Fort Worth market. Very recently, in 1959, it entered the Dallas market. It was acquired in 1957 or 1958 by Beatrice Foods, which had not previously sold in Fort Worth. It is estimated that Boswell's volume was approximately 32,000 gallons per day at the time it was acquired by Beatrice. Initially, it solicited retail customers on the west side of Dallas, and it now operates three retail routes in that market. It also has some wholesale customers in the western part of the city and, in 1960, started extensive solicitation for wholesale business throughout the rest of the Dallas market.

Foremost, Oak Farms, Borden and Metzger seem to be the principal suppliers of supermarket chain stores in the Dallas market. In some of the stores, Foremost has more shelf space than the others; in other stores, Oak Farms is the leading brand; in still others, Oak Farms and Borden each have more space than Foremost; and in some stores, Metzger has more shelf space. In the Wrigley Stores, Foremost has more space than any of its three competitors, which are Oak Farms, Cabell's and Borden. In Worth Food Stores, served by Foremost, Metzger and Borden, Foremost has more space than the others in one store; in another, Metzger and Foremost have equal space, more than Borden; and in another, Foremost and Borden have equal space and Metzger has less. In eight of the nine Minyard Stores served by

Foremost, Metzger is also a supplier. In the ninth, Metzger, Borden and Foremost share the space equally.

Dallas has been included with Sulphur Springs, Terrell, McKinney and Fort Worth in the North Texas Federal Milk Marketing Order issued by the Dairy Division of the Agricultural Marketing Service for a number of years. That Order is applicable to the Texas Counties of Cooke, Collin, Dallas, Delta, Denton, Ellis, Fannin, Grayson, Hopkins, Hunt, Johnson, Kaufman, Lamar, Parker, Rockwall and Tarrant. For each year, starting with 1956, the U.S.D.A. has published comparable universe figures as to the total milk sales in this area. In addition to these figures, respondent's total sales within the area are maintained by the Market Administrator and are also a part of the record, so that its share can be determined as follows:

FLUID MILK *(gallons).—North Texas Federal Market Order in area sales*

Year	Universe	Foremost	Foremost percentage
1956	55, 315, 112	8, 988, 699	16. 2
1957	57, 398, 372	9, 002, 726	15. 7
1958	57, 865, 698	8, 754, 897	15. 1
1959	58, 997, 651	9, 264, 494	15. 7

It will be noted that the 1959 volume of sales in the entire area served by Foremost increased from 8,754,897 gallons in 1958 to 9,264,494 gallons, and that its total percentage of the entire area gained from 15.1% to 15.7%. The record does not contain similar figures for the earlier period, from 1953 to 1955, so no comparison can be made from the time of the acquisition to the time the testimony was taken. However, the total volume of milk sold by the two Foremost plants (Dallas and Fort Worth) regulated by this Federal Order, whether sold in or out of the North Texas Order area, has increased since 1956 and the volume sold in 1959 exceeds any previous year:

1956—10,472,600 gallons
1957—10,564,500 gallons
1958—10,559,200 gallons
1959—10,830,400 gallons

2. As to San Antonio.

Foremost's initial entry into the San Antonio marketing area also occurred in 1945 with the acquisition of Southwest Dairy Products Company which had a fluid milk and ice cream operation in that area. Tennessee came into the market about 1951 when it had fluid milk sales there amounting to $242,500, and Foremost had sales in that market in 1951 of $3,082,800. It is estimated that, at that time, Foremost's share of the milk market was 15% and Tennessee's was 1.2%, so that as of 1951 Foremost had approximately 16.2% of the fluid milk market in San Antonio.

The San Antonio market is not quite so large as the Dallas market. In 1950, it had a population of about 408,000; and in 1960, it had 575,000. Approximately eight concerns, including Foremost, accounted for 100% of the milk sales in 1950. One of the concerns that was in business, Highland Dairy, was acquired in 1956 by Carnation which had not previously sold fluid milk in San Antonio, and other dairies have come into the market.

The largest dairy operating in San Antonio is the Knowlton Dairy, a single plant, family-owned concern, long established, which is engaged in wholesale and retail fluid milk distribution. It sells to all of the supermarket chains in San Antonio, including 18 H. E. Butt Stores, the 20 Handy-Andy Stores, the Model Markets, 18 Piggly-Wiggly Stores, the I.G.A., and Red and White groups.

Probably the second largest distributor of milk in the San Antonio area at the time of the acquisition was Borden, which sold to a number of the chain stores in that area at that time and has continued to do so.

Oak Farms, from Dallas, entered the San Antonio market about 1955. It now operates a distribution branch in San Antonio and sells fluid milk to all 28 of the Lone Star Drive-In Stores, a chain similar to the "Seven-Eleven" stores, which are not operated in San Antonio. Respondent formerly sold to these Lone Star Stores, but was replaced by Oak Farms.

Metzger, the independent concern discussed above in connection with the Dallas market, operates a processing plant in San Antonio where it sells fluid milk at wholesale and retail. It is estimated that its volume is approximately 7,900 gallons per day.

Other small dairies operating in that area are Baker, which sells fluid milk mostly at retail home delivery; Cream Crest, which has abandoned retail milk distribution and is selling exclusively at wholesale, and sells to the two principal chains in San Antonio, the 18 H. E. Butt Stores and the 20 Handy-Andy Stores, as well as to the Model Markets; the Faulk Dairy, which is estimated to have had 5% of the San Antonio market in 1950, operating 18 cash-and-carry stores and specializing in the sale of milk to the public in glass gallon jugs, and which was sold to the Producer's Cooperative Association in 1959; Milam Dairy, a family-owned, single plant fluid milk operation in San Antonio, which has been in business since 1940, and sells both at wholesale and retail; Rio Vista, a family-owned, single plant milk distributor with a retail home delivery business and also wholesale distribution; Escobeda Dairy, which operates a single plant in San Antonio, and sells at both wholesale and retail distribution, with its business principally on the west side of the city where the Mexican population resides; Superior Dairy, which operates a single plant in Austin, 75 miles from San Antonio, and which began to sell milk in the San Antonio area in 1958, with an estimated gallonage of approximately 26,000 gallons per day in that area; Schepp's, a Dallas concern hereinbefore mentioned, which first started selling in the San Antonio area in 1955; Carnation, a multi-plant concern operating in a number of areas of the United States, having entered the San Antonio market about 1956 when it acquired the Highland Dairy, hereinbefore mentioned, a local concern which at that time was estimated to have had 15% of the milk market. Carnation still operates the Highland plant in San Antonio and distributes fluid milk at both wholesale and retail.

Respondent has continued to sell milk in the San Antonio market from the plant it acquired in the Southwest Dairy Products acquisition in 1945, selling both at wholesale and retail. It sells milk to the 18 H. E. Butt Stores; 7, but not all, of the stores of the Model Market chain; and to some of the I.G.A. and Red and White group stores. The H. E. Butt Stores and the Handy-Andy Stores are the two principal chains in the San Antonio market. Respondent does not sell to any of the 20 Handy-Andy or to any of the 18 Piggly-Wiggly Stores, or to any of the 28 local Lone Star Drive-Ins, although it formerly enjoyed some of this business.

In the 18 H. E. Butt Stores in San Antonio, served by Foremost, Molton, Cream Crest and Borden, respondent has more shelf space in two of the stores than its competitors (40% and 35% respectively). In the 7 San Antonio Model Markets, served by Foremost, it has more shelf space in 5 of these stores than its competitors, Molton, Cream Crest and Borden (40%), and in the sixth store it shares equal space with Borden (30% each), while Molton and Cream Crest have 20% each.

According to the figures furnished by the Federal Milk Market Administrator for Bexar County, in which San Antonio is located, including all Federal military reservations, facilities and installations located there, respondent's volume of milk sales within that area increased from 2,576,600 gallons in 1953 to a high of 2,972,700 gallons in 1955, and then declined to 2,449,200 in 1959. During that same period, the market overall grew from a total of 15,246,000 gallons in 1953 to approximately 20,343,000 gallons in 1959. As a result, respondent's percentage of sales of the total market declined from 16.9% in 1953 to 16.6% in 1954, increased to 17.3% in 1955, and then declined each year thereafter until 1959 when it was 12.1%.

20. *Phenix Dairy, a Texas Corporation, Houston, Texas.*

(a) The Acquisition.

Pursuant to agreement dated July 5, 1952, Foremost acquired all of the outstanding capital stock of the Phenix Dairy, located in Houston, Texas, in exchange for 28,000 shares of Foremost common stock, plus 10,000 shares of Foremost preferred stock. An additional $275,000 was paid for certain real property. Foremost obtained a milk processing plant in Houston and an ice cream manufacturing plant at El Campo, Texas (about 75 miles southwest of Houston).

Prior to the acquisition, Phenix was engaged in the processing and distribution of fluid milk at wholesale and retail home delivery in the Houston, Bay Town and Wharton, Texas, areas (all within 60 miles of Houston), and at retail distribution in the Cleveland, Texas, area, and the distribution of ice cream in the Houston and El Campo, Texas, areas.

In 1951, Phenix had fluid milk sales in Houston, Texas, of $5,455,000 out of total fluid milk sales of $5,648,800, and ice cream sales in Houston of $34,100 out of a total of ice cream sales of $384,200. In the same year, Foremost had fluid milk sales in the Houston area in the amount of $1,492,200 and ice cream sales in the Houston area of $798,900.

(b) Market Conditions.

In 1950, Phenix had 15% of the fluid milk market in the Houston, Texas, area, and Foremost had 10% of the fluid milk market in the same area and 15% of the ice cream market. In addition to the fluid milk and ice cream sales, hereinbefore mentioned, Phenix sold butter of approximately $95,000 value in 1951.

Foremost's initial entry into the Houston market area occurred in 1945 by the acquisition of Southwest Dairy Products which manufactured and sold ice cream in that area, as well as in the San Antonio area hereinbefore mentioned, and in Fort Worth where it processed and sold fluid milk, and in Dallas, Texas, where it sold ice cream exclusively. It distributed fluid milk at other points in East Texas, including Cleburne, and ice cream in Huntsville and Beaumont, Texas, and in Shreveport, Louisiana, where it also sold fluid milk. In 1947, Foremost acquired the Metzger Dairy, a local fluid milk distributor in Houston. In 1948, it acquired F & M Dairies and, in 1949, the business of L. B. Fish, both located in Houston, Texas, and engaged in the sale of fluid milk in the Houston market area.

In 1950, according to estimates furnished by respondent, the relative sales positions of Foremost and its competitors in the sale of fluid milk and ice cream in the Houston, Texas, area were as follows:

MILK

Competitors	Comp.	Forem.
	Percent	*Percent*
Borden	50.0	
Carnation	20.0	
Phenix	15.0	
Others	5.0	
Foremost		10.0
Total	90.0	10.0

ICE CREAM

Competitors	Comp.	Forem.
	Percent	*Percent*
Borden	25.0	
Carnation	10.0	
Swift	15.0	
Sun-up	15.0	
Arden	10.0	
Others	10.0	
Foremost		15.0
Total	85.0	15.0

The bulk of Phenix sales was of retail home delivery in glass bottles, whereas, at that time, Foremost sold fluid milk principally at wholesale and had a large ice cream operation.

Foremost now serves the Houston market in both fluid milk and ice cream from its Phenix plants. Foremost's wholesale distribution in Houston is primarily through smaller stores. However, it does have some chain store outlets in the Houston area. At the time of the hearing as to this acquisition, in March 1960, it sold to all of the 12 A & P Stores; to the approximately 14 Super Value Stores, and to about 52 of the 60 "U-Tote-Ems." Respondent does not sell to some of the chain store supermarkets in the Houston area, including Weingarten with 42 stores; the Hinke-Pillot chain with 34 stores; and Minnimax with 45 stores. As to the stores that are served in the three chains by Foremost, each store is also supplied by Borden and Carnation, two other nationwide, multi-plant dairy concerns, and the percentage that each firm has of the shelf space in these respective stores varies considerably. In each of 5 Super Value Stores, Foremost has the most space, ranging from 40 to 60%. In 2 of the 11 A & P Stores, respondent has more space than either of its competitors, 45% in each case. As to 7 others, it shares equal space with Carnation, and the least space is held by Borden. In the remaining 2 stores, Foremost has less space than Carnation but more than Borden, 35 and 40%, respectively. In 21 of the 52 U-Tote-Em Stores, it has only 10% of the space and in 26, it has about 5% of the space. In the other 5 stores, the Foremost share varies from 10% to 35%.

The record contains figures showing sales of fluid milk by members of the South Texas Producers Association to Houston processors who, in turn, sell in Houston, Texas, and surrounding areas. According to these figures, the combined market share of Foremost and Phenix in 1952 was approximately 17%, as compared with the approximate 25% estimated by respondent's officials in response to a questionnaire from the Commission. It is not known upon what figures the estimate was based. Probably the correct estimate of the share would be somewhere between these two figures. At any rate, it is well established and the finding is made that, as the result of the acquisition, Foremost became the second largest distributor of fluid milk in Houston and the surrounding area.

In addition to Borden and Carnation, hereinbefore mentioned, the following dairy firms had plants in Houston and were distributing fluid milk in the Houston area in 1960: Sanitary Farm Dairy, Lone Star, Westmoreland Dairies and Nelson Milk Company. Lone Star was purchased by Oak Farms, of Dallas, in 1957. Lamar entered the market about 1958 from its Paris plant, 300 miles away. The Jere Dairy, in 1959, began to supply Houston from its Dallas plant, 245 miles away. Of these concerns, Westmoreland Dairy and Sanitary Dairy, together with Oak Farms, make up the group of independent distributors, since they operate processing plants in Houston. There are no figures in the record to indicate the volume of business done by any one of these smaller independent dairies.

There were two other Texas acquisitions of local concerns which are not being included in this finding. However, a reference should be made to them in order to get a complete picture of the respondent's operation in the State of Texas. First, on January 1, 1951, Foremost purchased the fluid milk business of Mrs. Tucker's Foods, located at Sherman, Texas. This firm processed and distributed fluid milk at wholesale and home-delivery retail in the Sherman, Texas, area and had sales of approximately $500,000 during the year 1950.

On June 27, 1952, respondent acquired the Taylor's Home Made Ice Cream Company, a Texas corporation, located at Fort Worth, Texas. It was engaged in the manufacture and distribution of ice cream in the Fort Worth area, and it was estimated that it had about 15% of the ice cream market in that area in 1950. Foremost was already in that area with both an ice cream plant and a fluid milk plant through the acquisition of Southwest, which had been acquired during 1947.

As a result of the acquisition of the three corporations, hereinbefore mentioned in this decision, namely, Phenix Dairy in Houston; Tennessee Dairies in Dallas and San Antonio; and Banner Dairies in Abilene, Foremost became a substantial factor in the distribution of fluid milk and ice cream in four definite market areas or sections of the country: (1) Fort Worth-Dallas, (2) Houston, (3) San Antonio, and (4) Abilene. In addition, Foremost now has scattered distribution in other parts of Texas, namely, the Rio Grande Valley in and around Brownsville; Western Texas, including Odessa, Big Spring and San Angelo; East Texas, including Tyler, Kilgore, Longview and Sulphur Springs; Southeast Texas, in Beaumont, Port Arthur and Orange; and further southeast in Corpus Christi, Texas. It sells in the principal metropolitan areas. However, there are some metropolitan areas in which respondent does not have substantial distribution: that is, Austin, the capital of the State, located between San Antonio and Waco (where respondent is represented); the far western City of El Paso; and the panhandle cities of Amarillo and Lubbock, although respondent now has some distribution in Lubbock but not as a direct result of an acquisition.

Counsel for respondent, in their proposed findings, suggest that the hearing examiner find that the acquisitions in Texas of Foremost, including Banner Dairies, Tennessee Dairies and Phenix, have not adversely affected competition in any of the relevant markets. With special reference to the acquisition of Banner Dairies, it is their contention that because of the increased number of competitors and the size and scope of their respective operations; the growth of the single-plant and independent concerns and their success in selling to major supermarkets; the doubtful future of the acquired company which they claim represented respondent's entry into a new area; and the absence of any record showing that respondent has more than maintained its inherent position, the acquisition has not adversely affected competition in the Abilene market.

As to Tennessee Dairies, they make the same contention, citing the increased number of competitors in the relevant markets; the size and scope of their operations; the growth of the local independent concerns; their success in selling to supermarkets; the decline of respondent's post-acquisition market share in the respective markets served by it; and the further fact that the acquisitions represent respondent's entry into areas not previously served by it.

Finally, as to Phenix, the same contention is made and emphasis is placed upon the entry of new competitors who have at least maintained the number of concerns competing within the market, notwithstanding respondent's acquisitions; the size and scope of the operations of competitors in general and of two local, single-plant concerns in the market; and the unusually dominant position and unique distribution system of the multi-plant concern (Borden) which was the market leader prior to respondent's acquisition of Phenix; respondent's inability to maintain the retail business of Phenix; its problems in holding the small chain supermarket representation that it had; and the probable post-acquisition decline of market share suggested by the figures furnished by the South Texas Producer's Association records.

It is recognized that, with respect to the Tennessee Dairies acquisition, a portion of the business acquired was noncompetitive. Reference is made to the fluid milk business in the City of Dallas and the surrounding area where respondent had not been represented in the sale of fluid milk, although it had, for a number of years, sold ice cream in that market. In this connection, it is believed that the ice cream business is complementary to the sale of fluid milk and that the acquisition gave Foremost a competitive advantage by enabling it to offer a full line of dairy products to its customers. However, in the San Antonio market, the acquisition was horizontal in that Foremost sold both ice cream and fluid milk in that area prior to the acquisition. In some of the outlying territory in East Texas, and also in the Rio Grande Valley, respondent had not theretofore been represented, so that to some extent a portion of the Tennessee Dairies' business outside of San Antonio was not a horizontal acquisition.

With respect to the Banner Dairy acquisition, however, the acquisition was horizontal in the ice cream business in Abilene, but not in fluid milk in Abilene or its surrounding territories. Here again the acquisition gave Foremost a competitive advantage by enabling it to sell a full line of dairy products to its customers.

With respect to the Phenix acquisition in Houston, Texas, it was a horizontal acquisition in the sense that Foremost had been in that area engaged in the sale of both ice cream and fluid milk.

It must also be concluded that Foremost did not become the largest distributor of dairy products in the Dallas area as a result of the acquisition of Tennessee Dairies. However, it is a substantial factor and ranks second or third with a percentage of the market above 15%

in the total metropolitan area of Dallas and surrounding counties. Its percentage of the total fluid milk and ice cream business in the Dallas market probably was higher, due to the large number of chain store supermarkets to which it sells fluid milk.

Likewise, in the San Antonio market, Foremost does not occupy the leading position. It is probably third as a result of the acquisition, with a percentage of the total market at the present time lower than it was at the time of the acquisition. However, in San Antonio, as in Dallas, Foremost has a substantial distribution of dairy products through the chain store supermarkets.

In the Houston market, again Foremost is not the leading distributor of dairy products but, as a result of the acquisition of Phenix Dairy, it became the second largest with a percentage varying somewhere between 17 and 25% of the market. While its distribution in chain stores is not quite so strong in Houston as it is in San Antonio and Dallas, Foremost is a substantial factor in the distribution of milk through the chain stores. In view of the foregoing facts, little weight is given to the contention that respondent's share of the market had declined subsequent to the acquisition, or to the entry of smaller units in those respective markets. Furthermore, there is no evidence in the record that any of the small units entering the respective markets subsequent to the acquisition was equal in size to the acquired company.

It is also believed that the advantage that Foremost has, as a result of these numerous acquisitions, over local competition in all of the four markets outlined, and the relative position it now has in those markets, growing out of the acquisitions, or as a result thereof, has given Foremost a decisive advantage over all local competition and an equal position with Borden and Carnation in those areas, and that this overall advantage is sufficient to justify a finding as to the probable adverse effect upon competition in the market areas where the acquired companies were engaged in the dairy business. Another factor which is very important is that the addition of Banner, Tennessee and Phenix not only added to Foremost's overall volume, but it contributed to Foremost's geographical diversification, thus protecting it more fully from local business declines in any one area. According to Mr. Turnbow, President of Foremost, this is an important factor—geographical diversification protects the company from local business declines. He testified:

> You must have diversification, not only of products, but diversification as to territory. One particular territory might be the ruination of your business if you happen to get into difficulties there. * * * Yes, you spread the risk a little but that is right. [Tr. 1143]

21. *Golden State Company, Ltd., a Delaware Corporation, San Francisco, California.*

(a) The Acquisition.

Pursuant to an agreement of merger, approved by Foremost and the Golden State Board of Directors on December 3, 1953, and ratified by the stockholders on February 25, 1954, effective February 26, 1954, Foremost acquired Golden State Company, Ltd. (sometimes hereinafter referred to as Golden State), located at San Francisco, California. The acquired company was merged into Foremost on a stock exchange basis, the new stock being issued to stockholders of both Foremost and Golden State. Golden State thus became a division of Foremost. In this acquisition, Foremost also acquired the following wholly owned subsidiaries of Golden State: Gold Medal Dairies, Inc., a cheese manufacturer located in Montana, and Maid of California, Inc., located in Vallejo, California, which processed and distributed fluid milk in Solano and Napa Counties.

Prior to the acquisition, Golden State was engaged in the processing and distribution of fluid milk at wholesale and home-delivery retail, and in the manufacture and sale of ice cream. It also distributed a full line of dairy and related products, including cottage cheese, cheddar cheese, eggs, butter, evaporated milk, dry milk, orange juice, etc., operating substantially over the entire State of California. In terms of dollar sales, it had the largest overall dairy business in the State of California, and served most of the important communities in that State. On a State-wide basis, Golden State was California's largest fluid milk processor. From 1945 through 1953, Golden State acquired 13 milk and ice cream concerns in different parts of California, and Gold Medal Dairies, Inc., a manufacturer of cheddar cheese, located in Montana, hereinbefore mentioned. In 1953, its net sales exceeded $120,000,000; its net income was approximately $1,369,000; and it had assets amounting to approximately $32,000,000. Its volume of sales of fluid milk was approximately $43,000,000 and of frozen desserts, including ice cream, approximately $15,000,000. At the time of the acquisition, Golden State had processing plants in San Francisco, Oakland, Sacramento, Newman, Santa Barbara, Los Angeles, Riverside, Fresno, San Jose and Salinas, California, as well as two dry milk plants in Humboldt County and a cottage cheese and dry milk plant in Los Banos, California.

(b) Market Conditions.

At the time of the acquisition, Foremost was in competition with Golden State in the Alameda-Contra Costa Milk Market through the prior acquisition of Diamond Dairy of Oakland, in February 1952, and in the R. A. Shuey Creamery in December 1952, also of Oakland, both engaged in the distribution of fluid milk. It was also in competition with Golden State in the San Francisco, San Mateo and Santa Clara Milk Markets through the prior acquisition of Marin Dairymen's Milk Co., Ltd., sometimes hereinafter referred to as Marin-Dell, which respondent had acquired by an agreement of May 1, 1953, through exchange of stock. In these four markets, Golden State's volume of fluid milk sales in 1953 amounted to 15,847,033 gallons, which was approximately 30% of its total fluid milk sales in the State. Foremost's sales of fluid milk in the same areas in 1953 were 8,049,263 gallons.

In 1953, Golden State had 20.2% of the fluid milk sales in the San Mateo marketing area, 15.4% of the San Francisco marketing area, 22% in the Santa Clara marketing area, and 22% in the Alameda-Contra Costa marketing area. In the last named area, Foremost was distributing fluid milk through facilities which it had acquired from the Shuey Creamery and the Diamond Diary in 1952, as hereinbefore indicated.

Also in 1953, Marin-Dell had 9.5% of the fluid milk sales in the San Francisco marketing area and Foremost had 12.8%. Combining those percentages with the Golden State 15.4% would give respondent approximately 38% of the fluid milk sales in the San Francisco marketing area as a result of the acquisition.

Likewise, in the Santa Clara marketing area, in 1953, Marin-Dell had 2.8% of the fluid milk sales, Golden State had 22% and Foremost had 4.2%, or a total of approximately 29% of the Santa Clara fluid milk market came under the control of Foremost as a result of the acquisition.

In 1953, Foremost had 3.9% of the fluid milk sales in the Alameda-Contra Costa marketing area through Diamond Dairy and Shuey Creamery facilities, and Golden State had 22%, so that as a result of the acquisition, Foremost obtained control of approximately 26% of the fluid milk sales in that marketing area.

After the acquisition of Golden State by Foremost, many changes were made in the operation of the acquired concern, including changes in management; overhauling the accounting system; increasing the average number of units per route; establishing distribution centers; use of refrigerator trucks; changing advertising procedures; changing the advertising agency; modernizing the package; rearrangement of sales routes; automation and modernization of the equipment; etc., and as a result, the rate of earnings of Golden State increased from .95% in 1953 to 2.45% in 1954.

Taking up first the competition in the Alameda-Contra Costa marketing area at the time of the acquisition of Golden State in 1954, there were 22 competitors in that area, including Borden, the multi-plant, nation-wide dairy concern which operated a processing plant in that area and engaged in both wholesale and retail distribution, selling an annual volume of approximately 4,000,000 gallons, and having approximately 11.7% of the market of fluid milk in that area. It ranked third in the market at that time and is reported to have declined to fourth by 1955, although it had about the same share of the market.

Carnation, another multi-plant, diversified company, operates one of its processing plants in the Alameda-Contra Costa market. It also has processing plants in Los Angeles, San Diego and Bakersfield. In 1954, its share of the market in fluid milk in the Alameda-Contra Costa area was approximately 15%, which declined to approximately 14.4% in 1955. It ranked second to Foremost in both years.

Another fluid milk distributor in the Alameda-Contra Costa market is the single-plant company, Berkeley Farms. Originally serving only Berkeley and Richmond, it extended its distribution over the entire Alameda-Contra Costa market, and since 1952 it has entered the Santa Clara and the former San Mateo market. Formerly, it was predominantly engaged in retail home delivery distribution, but in recent years it has sold at wholesale as well. It has increased its sales in the Alameda-Contra Costa market from approximately 3,500,000 gallons in 1952 to 4,200,000 gallons in 1955. Its market share increased from 10.5% in 1953 to 12% in 1955 when it ranked third in volume of fluid milk sales in that area.

As hereinbefore indicated, in 1954 respondent, having succeeded to the business of Diamond Dairy, Shuey and Golden State in the Alameda-Contra Costa market, had a market share of 25.6%. In 1955, it had increased its sales and its market share to 26%. The record contains fluid milk figures, Alameda-Contra Costa market, for later years which show a downward trend in the volume of sales of Foremost in this area and its share of the market declined to approximately 22% in 1958.

Some of the smaller independent distributors have increased their volume during this period of time, from 1954 to 1958, the principal increase being by the Cloverleaf Farms which has its plant located at Stockton, California, and which has, since 1954, begun to sell in the Alameda-Contra Costa market, primarily in retail distribution, but some at wholesale. By 1955, it had 2% of the fluid milk market in that area.

Turning now to competition in the San Francisco, San Mateo and Santa Clara markets:

1. The San Francisco market.

At the time of the acquisition, in February 1954, Foremost was already in the San Francisco market through the prior acquisition of Marin-Dell in May 1953, as hereinbefore indicated. At that time there were ten companies selling milk in the San Francisco market. In addition to Marin-Dell and Golden State, there were Borden, Green Glen, Lucerne (Safeway), Spreckels-Russell, Sun Valley, Christopher, Arden Farms, using the trade name "Arden-Dairybelle", Challenge (operating an acquisition of Bell-brook, as "Glen Maid", supplying only the Purity chain of stores). Today, most of the foregoing concerns and Carnation, which entered the market in 1958, and Peninsula Creamery, which entered in 1955, are in the San Francisco market competing with Foremost.

When respondent acquired Marin-Dell, in 1953, it became the second largest seller in the market, with a share of 22.3%. That same year, Golden State was third, with a market share of 15.4%. Thus, the share of the combined volume of the two concerns which finally merged into Foremost was 37.7%.

In 1954, the year that Foremost acquired Golden State, its sales volume of fluid milk, combined with that of Golden State, had a market share of 36.4%.

In 1955, respondent's share of the San Francisco market was 35%.

During 1956, the San Francisco market was redefined by the State Regulatory Agency to include a part of what had been the adjoining San Mateo market. Consequently, comparable figures are not available for the years after 1955.

2. The San Mateo market.

In 1953, when respondent acquired Marin-Dell, there were 15 companies competing in the San Mateo milk market. In addition to Marin-Dell and Golden State, the other concerns were: Baywood Dairy, Borden, Challenge-Bell-Brook, El Camino Creamery, Carnation, Arden-Dairybelle, Peninsula Creamery, Pier's Dairy, Toyon Creamery, Inc., Lucerne (Safeway), Spreckels-Russell, Sun Valley Dairy and Berkeley Farms. With the acquisition of Golden State in 1954, the number was reduced to 14, but in 1955 Beatrice, doing business as Missions Creamery, entered the San Mateo market, as did Christopher, making 16 concerns at that time. Because the San Mateo market was redefined in 1956, and eliminated as of the beginning of 1957, there is no way to enumerate the competitors in the San Mateo area after the year 1955.

Borden, in 1953, had 21.5% of the San Mateo milk market. Although its gallonage increased in 1955, the market overall grew faster and Borden's share declined to 21.4%.

Baywood had a fluid milk sales volume in the San Mateo market in 1953 which represented 2% of the total; in 1955, its sales were 2.1% of the market.

The Challenge-Bell-Book combination had a fluid milk sales volume in the San Mateo market in 1953 which was 4.5% of the market. In 1955, its volume, through the entry of its "Glen Maid" operation, gave it a share of approximately 5% of the market.

El Camino Creamery, a local concern engaged only in retail home delivery distribution, had a fluid milk sales volume which had a market share of 1.5% in 1953. It increased its share to a percentage of 1.6% in 1955.

Carnation, the well-known, multi-plant concern, in 1953 sold 4.2% of the San Mateo market, which increased in 1955 to 4.6% of the market.

The Arden-Dairybelle operation had fluid milk sales in the San Mateo market in 1953, which had a market share of 7.2%. In 1955, its market share was 4.7%. During that period it dropped from fourth to sixth rank in the market, and was surpassed by Berkeley Farms and Challenge.

Peninsula Creamery, a local family-owned concern, was engaged predominantly in retail home delivery distribution of fluid milk, but had some wholesale business. Its percentage share of the market was reduced from 10% in 1953 to 9.2% in 1955, although it increased its volume of sales.

Pier's Dairy, individually owned and operated, a single-plant concern, is located in the San Mateo area. It started in business shortly before 1950, after its owner had sold another dairy in Menlo Park to Golden State. It was engaged in both wholesale and retail distribution of fluid milk. It increased its sales in 1955 over 1953, but its share of the market declined from 7.8% to 5.2%.

Toyon Creamery is another single-plant concern. Its sales in fluid milk declined from 1953 to 1955, and its share declined in the San Mateo fluid milk market between 1953 and 1955 from 5.3% to 3.8%.

Berkeley Farms entered the San Mateo milk market in September 1952 from its Berkeley plant in the Alameda-Contra Costa market. In 1953, its first full year of operation, it had 1.4% of the new market. By 1955 it had increased its sales volume and its percentage to 5% of the market.

Spreckels-Russell served the San Mateo milk market from its San Francisco plant at the time respondent acquired the Marin-Dell in 1953. It increased its volume in the San Mateo market slightly in 1955 over 1953, but its share of the market declined from 4.3% in 1953 to 4.1% in 1955.

Sun Valley Dairy, a single-plant concern, started by a former Golden State employee, first entered the San Mateo market about 1950. By 1955, its milk sales were 1.6% of the market.

Christopher Dairy Farms, a single-plant concern from San Francisco, entered the San Mateo market in 1955 and gained 1% of the market that year.

In 1953, the Marin-Dell sales of fluid milk in the San Mateo market had a market share of 6.7%. That same year Golden State was the second ranking concern in the market with a market share of 20.2%, thus the two concerns ultimately acquired by Foremost had combined sales which were 26.8% of the market.

In 1954, Golden State's sales of fluid milk, combined with Marin-Dell's, gave Foremost a market share of 25.8%. Foremost then became the largest distributor of fluid milk in the San Mateo market.

In 1955, Foremost's combined volume of sales of fluid milk through Marin-Dell and Golden State gave it a market share of 27%.

As hereinbefore noted, the San Mateo milk market was redefined during 1956 so comparable figures are not available after 1955.

3. The Santa Clara market.

When respondent acquired Marin-Dell in 1953, there were 13 concerns competing in the Santa Clara milk market. In addition to Marin-Dell and Golden State, they included: Borden, Challenge-Bell-Brook, Carnation, Edelweiss Dairy, Arden-Dairybelle, Beatrice (doing business as Mission Creameries), Pier's Dairy, Santa Clara Creamery, Standard Dairy, Lucerne (Safeway), and Valley Milk Company. In 1955 three additional concerns: Toyon Creamery Co., Spreckels-Russell Dairy Co. and Berkeley Farm entered the market so there were then 16 competitors.

At the time Foremost acquired Marin-Dell in 1953, Borden was the second largest distributor of fluid milk in the Santa Clara milk market behind Golden State with 20.6% of the market. By 1955, although its volume had increased slightly, its share of the market declined to 19.7%.

Challenge-Bell-Brook Company also experienced a decline in market share between 1953 and 1955 of from 8.8% to 7.3%.

Carnation's share of the market was reduced from 13% in 1953 to 10% in 1955.

Edelweiss Dairy, a locally owned, single-plant company, in the Santa Clara market, engaged exclusively in retail home delivery. It increased its gallonage and also its share of the market from 1.7% to 2.1% in 1955, as compared to 1953.

Arden-Dairybelle's share of the market declined from 3.4% in 1953 to 2% in 1955.

Beatrice, the well-known, multi-plant concern, increased its sales volume from 1953 to 1955, and also was able to maintain its percentage of the market at 10%.

Pier's Dairy, a single-plant concern, increased its gallonage in 1955 over 1953, and also its share of the market from 3.5% to 4.3%.

The Santa Clara Creamery Company, another small, single-plant company, increased its sales of fluid milk in gallons and also its share of the market from 2.5% in 1953 to 3.1% in 1955.

Standard Dairy, operating a single plant in the Santa Clara market engaged predominantly in retail distribution, increased its sales somewhat and its share of the market remained at .6%.

Another single-plant concern, Valley Milk Company, had 1.9% of the market in 1953 and increased that percentage to 2.4% in 1955.

Peninsula Creamery, formerly in the Santa Clara market in 1951 or 1962, came back into the market the last month in 1954 and its 1955 sales were 2.6% of the market.

The combined fluid milk sales of the three newcomers to the Santa Clara market in 1955: Toyon, Berkeley Farms and Spreckels-Russell accounted for 3.5% of the market in 1955.

At the time of respondent's acquisition of Marin-Dell in 1953, that concern had 7% of the Santa Clara milk market. Golden State, the largest seller, accounted for 22.4% of the market. Their combined volume was a 29% share of the market.

During 1954, the combined sales of Foremost and Golden State accounted for a market share of 30.1% as compared to 29% in 1953.

In 1955, the Foremost volume increased but its market share declined to 27.8%.

Summarizing the foregoing milk market figures, respondent's market share, as a result of the acquisition of Golden State in 1954, in the Alameda-Contra Costa milk market was approximately 25% of that market, it being the largest distributor of fluid milk in that area as a result of the acquisition. In the consolidated figures for the San Francisco, San Mateo and Santa Clara markets at the time of the acquisition, respondent had approximately 31% of the fluid milk sales, and was also the largest distributor in that combined area. The total population of the foregoing area was approximately 2,340,000.

In other markets where Foremost had not been represented prior to the acquisition, as a result of the acquisition of Golden State in 1954, it succeeded to 22% of the Sacramento market; approximately 17% of the Fresno market; approximately 9% of the Los Angeles-Orange markets; 4.2% of the San Bernardino-Riverside market; and 10% of the San Diego market. In all these markets, respondent's share of the market declined in subsequent years, with the exception of the San Bernardino-Riverside market. The decline was slight in the Los Angeles-Orange market, and in the San Diego market, where respondent acquired a local dairy, Hage's, having 9.5% of the market, which combined with Gold State's 1.3% gave Foremost a total of 10.8% market share in 1954. In 1958, the share of respondent in the San Diego milk market was 9.7%.

In 1955, Foremost, Borden, Pier's Dairy and Peninsular had 62.8% of the fluid milk sales in the San Mateo marketing area with the balance of the fluid milk sales divided among 13 concerns.

In 1955, Foremost, Bordon and Spreckels-Russell had 69.1% of the fluid milk sales in the San Francisco marketing area with the balance of the fluid milk sales divided among 7 concerns.

In 1955, Foremost, Borden, Carnation and Beatrice had 67.5% of the fluid milk sales in the Santa Clara, California, marketing area, with the balance of the fluid milk sales divided among 15 concerns.

In 1955, Foremost, Carnation, Borden, Challenge, and Berkeley had 74.4% of the fluid milk sales in the Alameda-Contra Costa marketing area, with the balance of the sales divided among 19 concerns.

Although the foregoing sections of the country are the areas upon which the decision in this case is based, the record contains sales figures of the overall California area, that is, respondent's percentage of the total sales of fluid milk in California. These figures indicate that, for the year 1954, the first year that respondent operated Golden State, the total volume of sales of fluid milk in California by Foremost was 63,920,628 gallons and the percentage of the total California sales of fluid milk in gallons was 16.1%, and that during the succeeding year, 1955, the first full year of respondent's operation of its Golden State acquisition, although the sales increased to 66,529,422 gallons, the percentage of total fluid milk sales in the State declined to 15.7%.

Respondent's percentage of total California sales of fluid milk has declined each year in succeeding years, although its volume of sales has increased.

Respondent is the largest distributor of fluid milk in California, the second largest being Arden Farms with approximately 9% of the market. The combined sales of Foremost, Arden Farms, Carnation, Borden and Beatrice account for approximately 40% of the market.

Reference is made at this time to the items, frozen dairy products and ice cream, in which business respondent was engaged before the acquisition of Golden State which was a substantial factor in the sale of those products in California. The following table, taken from respondent's brief (p. 33), sets forth the gallonage of frozen dairy products for the total California production, respondent's California production and respondent's percentage of the total.

Year	Total California production (gallons)	Respondent's California production (gallons)	Respondent's percentage
1955	68, 143, 000	13, 501, 179	19. 8
1956	72, 842, 000	14, 220, 815	19. 5
1957	77, 560, 000	14, 753, 982	19. 0
1958	83, 813, 000	15, 136, 717	18. 1

The foregoing table includes ice cream, ice milk, sherbet, imitation ice cream and imitation ice milk, but excludes water ice and retail ice cream production. It will be noted from this table that the Foremost volume of sales has increased each year, although the percentage of total has declined 1.7% in four years. This is due to the fact that the total sales increased 23% while Foremost's increased 12%.

In order to make a comparison of the volume of frozen dessert business of respondent with those of its competitors at the time of the acquisition, the following figures are taken from exhibits furnished by both counsel for the respondent and the Commission for the year 1955. Out of a total of 70,301,000 gallons of ice cream and other frozen products in 1955, Foremost is first with approximately 13,000,000 gallons or 18.49%; Arden Farms is second with 10,180,000 gallons or 14.48%; Beatrice Creamery had a volume of approximately 5,600,000 gallons, or 8% of the total; and Borden, 4,872,000 gallons or 6.93% of the total. In the aggregate, the sales of these four dairy concerns accounted for approximately 48% of the total sales of ice cream, ice milk, milk sherbet, and other frozen dairy products in the State of California during the year 1955. The record contains figures from the Carnation Company but they are not included because it was found that they contained figures for ice cream mix. If they were included, their volume of sales would be approximately 11% and the total sales of frozen desserts for the five concerns would be around 57%. There is no way of knowing how much of their total sales consisted of ice cream mix, so for that reason Carnation sales are left out of the compilation.

It will be noted that there is a slight difference between the total gallonage figures in the two foregoing tabulations. The one which was taken from figures submitted by counsel for the respondent gives a larger percentage to Foremost for the year 1955. This is accounted for as follows: the 13,000,000 gallon figure used for Foremost in the comparison with others did not include mellorine or imitation ice cream, whereas respondent's California figure, in the percentage table, included imitation ice cream but not water ices, and the amount there, taken from Respondent's Exhibits 48 and 314, is 13,501,179 gallons and is more reliable.

Counsel for the respondents have asked the examiner to conclude that the California acquisitions have not adversely affected competition, emphasizing particularly the increase in the number of competitors within the individual markets; the growth in volume and increased market share attained by competitors, including small, single-plant concerns; the decline in market share experienced by respondent and the other large, multi-plant, diversified concerns in the individual market; and the respondent's general decline in position on an overall basis within the State. Consideration has been given to this contention on the part of counsel for respondent, and the facts upon which he has drawn his conclusions and recommendation. However, there are some facts which he has not mentioned in support of his recommendation which it is believed have more probative value in determining whether or not competition has been adversely affected as a result of the acquisition in California. In the first place, in those market areas where the acquisition was horizontal, that is, where the respondent was already in the dairy business, the acquisition of Golden State resulted in the removal from the field of competition of its principal competitor in all areas but one, and gave to the respondent in all areas a position of leadership with the largest share of the market of fluid milk. Insofar as the decline in volume of business done by Foremost after the acquisition in some areas, not in all, is concerned, this is a natural and ordinary experience of competition. When an outside concern comes into an area, it is unusual for it to retain all of the business of the acquired company. In fact, Mr. Turnbow, in his testimony in this case, indicated that it had been the experience of Foremost that when it acquired a company it generally loses anywhere from 10 to 20% of the business of the acquired company, that sometimes it recovers that business, and sometimes it does not. Consequently, very little weight is given to that type of evidence.

Mr. Turnbow testified as to another phenomenon which characterizes the Golden State acquisition in California, as well as other acquisitions of the respondent, and that is one advantage that a multi-plant, nation-wide concern has over local competitors. Mr. Turnbow testified that the diversification of products is an important factor in the ability to compete, and that a dairy company that can offer the customer a complete line of products has a competitive advantage over a company that sells only milk or ice cream singly. He also testified that the larger producer, the dairy with large equipment, has a distinct cost advantage over the small processor and distributor:

> He has an advantage in that he is able to do research. He is able to have a control laboratory. He is able to put in equipment that costs a lot of money but will process a larger volume of product.

He further stated that a plant doing much less than 7,000 gallons of milk a day has a very hard time under present laws of paying its farmers and the suppliers of its product.

Another factor which it is possible respondent did not take into consideration in its recommendation is the evidence of a tendency to concentration in the sale of fluid milk and frozen desserts in the hands of four or five large processors in the local areas where respondent competed with Golden State prior to the acquisition, and also in the State of California as a whole. As a result of the acquisition of Golden State, the respondent has nearly 20% of the frozen dessert industry, and the nearest competitor, another large concern, though local in operation, has less than 15%. The total of four of the larger processors, including two other multi-plant operations, Borden and Beatrice, is nearly 50% of the total sales in that industry. Although this concentration does not exist to the same degree in the fluid milk industry, the fact remains that Foremost is the largest distributor and that a combination of its sales with those of four other concerns results in a concentration of approximately 40% of the industry. This acquisition then appears to result not only in a substantial lessening of competition, but also in a definite tendency to the creation of an oligopoly in the fluid milk and frozen dessert industries in California. In an oligopoly there is an inherent tendency to make cooperative rather than individual business judgments. A few large sellers dominate the market, and each knows that his policies have a substantial effect upon market conditions and upon the marketing policies of the others.

III

Testimony of M. A. Adelman

The President of respondent freely testified that the diversification as to territory is an important factor in the ability of a dairy company to compete by spreading the risk overall in that it can "hedge" losses in one area with profits in another in consequence of its geographic diversification. However, counsel for respondent attempted to attack the contention that such diversification was a competitive advantage and introduced into evidence the testimony of Mr. M. A. Adelman of the Massachusetts Institute of Technology as to the economic and statistical character of "hedging" through diversification, to establish the proposed finding that no "competitive advantage" within the purview of Section 7 of the Clayton Act has been attained in consequence of the acquisitions by respondent discussed herein. It is concluded that the testimony of Mr. Adelman, on this point, is incompetent and does not successfully contradict the foregoing testimony of Mr. Turnbow.

Reference is made to the proposed findings of the respondent, beginning on page 293, entitled: "The Record of Big Concerns Measured Against the Dairy Industry Over All." It refers to testimony of Mr. M. A. Adelman, hereinbefore mentioned, who in addition to his analysis of "hedging", prepared certain studies on behalf of the respondent directed to the question of the alleged competitive advantage of "bigness" in the dairy industry. He assembled statistics relating to the size and structure of the dairy industry and formulated conclusions indicated by that information as to the place of big, diversified companies. His source data consisted of government statistics, mostly those of the United States Department of Agriculture. Having done that, he then prepared a comparison of the rates of growth of the big companies with the dairy industry overall. He started with the premise that the big, diversified concerns in the dairy industry have a competitive advantage, even in an expanding market, and that over the years their performance should be better than that of the industry, and their position in the industry should be enhanced. He included the seven largest processors and manufacturers in the dairy industry as follows: National, Borden, Beatrice, Fairmont, Carnation, Pet and Arden Farms, but omitted the respondent in this case for the apparent reason that it was not a competitive factor prior to 1950, and the period covered by the study was from 1935 to 1958. The conclusion was that four of the seven big, diversified concerns; Borden, Carnation, Pet and Fairmont, have not experienced a growth rate as rapid as that of the industry.

In considering the testimony of Mr. Adelman, the following facts should be taken into consideration:

1. He made no attempt to appraise the competitive character of any dairy market, either in a broad sense or a geographical sense.

2. The limitations on the figures, bearing on the size of the dairy industry and the component parts thereof, were not so much the quality of the figures, but their coverage. Mr. Adelman recognized this when he testified:

> You do not have any figures of a kind * * * on physical volume and dollar value of the various products which make up the dairy industry, assembled on a consistent basis which would permit you to add them all up and get a meaningful total. (Tr. 3622)

This is due to the fact that for many years the most important part of the dairy industry, fluid milk processing and distribution, was not looked on as a manufacturing operation—it was classified by the census as "in trade." This was true until the late 1930's when the first standard industrial classification was worked on—which classification was revised in the late 1940's when fluid milk processing and distribution was made a part of manufacturing in the census figures. Mr. Adelman further testified:

> You don't have a historical record of comparable figures that stretch back in time which you can use for a series. You have instead these figures on fluid milk processing hidden and it is impossible to get them out because these figures weren't collected in the first place—physical volume, dollar value. They just were not collected at all. They don't exist—prior to 1954. That was the first attempt made to get statistics on the fluid milk industry. (Tr. 3624)

Mr. Adelman's problem was to see whether he could get a measure over a substantial time period in physical volume terms, and in money terms, of the economic size of the dairy industry and its principal components such as fluid milk, frozen desserts, butter, cheese, etc. He finally decided that a money measure was essential since pounds of milk could not be added to pounds of cheese or gallons of ice cream. He considered three kinds of money measures feasible; sales, the processing margin and assets.

Respondent also makes a comparison of production shares of eight of the largest dairy companies in relation to fluid milk sales and frozen dairy products. The conclusion is drawn from these figures that some members of the dairy industry have not grown as rapidly as the industry since 1950, notwithstanding acquisitions that they had made. Reference is made, in this connection, to National and Borden, two of the largest multi-plant dairy companies. From this it is further concluded that the diversified concerns did not have a competitive advantage over their smaller competitors, because their position had not been enhanced and their share of the market had not increased.

The foregoing contentions or proposals with respect to the testimony of Mr. Adelman are rejected as not tenable.

In view of the foregoing facts with respect to the availability of reliable data upon which to base any conclusion or premise as to volume of sales in the dairy industry prior to 1954, it is concluded that Mr. Adelman has attempted to use too many imponderables; to have made too many assumptions; and relied upon too many estimates for any probative value to be given to his testimony, and the exhibits prepared by him relating to historical statistics of the dairy industry, and any comparative figures set forth in tables covering a period prior to 1954 cannot be relied upon.

For instance, in his preparation of a fluid milk universe for the years 1935 through 1958, Mr. Adelman concluded that 11.4% of all fluid milk consumed was sold at wholesale to restaurants, institutions and hotels. On cross examination he admitted that his constant usage of this figure did not take into consideration "the tremendous change that has taken place in the working population, for example, in the last 25 years, the employed people of the United States, the tremendous increase in the military consumption of fluid milk during World War II and the Korean War, or the increased school enrollments and hospital admissions."

Another assumption that is questionable was Mr. Adelman's cash universe of fluid milk based on the price paid per quart of fluid milk at wholesale or home-delivery retail. This study completely ignored the undisputed evidence contained in his own source material that an increasingly greater percentage of milk is being sold in the half gallon or gallon containers, and that the quart containers sold for as much as 1¼ to 1½ cents more than the larger containers on a per unit basis.

In applying either the wholesale price per quart or the retail home delivery price per quart, Mr. Adelman's conclusions were based on a survey of twenty-five big cities in the United States. The credibility of these conclusions is diminished by his admission that the average price paid for fluid milk in the quart container might be higher or lower in other sections of the country, particularly in small towns or villages.

Another arbitrary assumption on the part of Mr. Adelman, which would tend to reduce the credibility of his ultimate figures, was the allocation of 88.6% between wholesale and home-delivery retail; the result for the years 1953 through 1958 was 52% wholesale and 48% home-delivery retail. This assumption was made despite the fact that another witness called by the respondent, Dr. Christianson, indicated that home-delivery retail was rapidly declining, and that in October 1959 he was advised by the Department of Agriculture that wholesale sale of milk accounts for approximately 60% of all milk sold. (Tr. 3133) Dr. Turnbow, President of the respondent, testified in 1959 that the industry average as of that time was between 70% and 72% wholesale, and the balance retail. Foremost at that time was operating at about 63% wholesale and 30% home-delivery retail. The undisputed evidence shows that the home-delivery retail price is from 2 to 3 cents per quart higher, so that the 48% home-delivery retail conclusion created an upward bias in the cash universe.

Probably the most serious objection to Mr. Adelman's tabulation and study is in the cost figures used on frozen desserts. Mr. Adelman admitted that in computing the dollar sales universe of frozen dairy products he had a problem, particularly in arriving at the wholesale price in cents per gallon. Aside from the fact that the U.S. Department of Agriculture production figures were available in only the later years, there were no such figures at all with respect to prices for frozen dairy products, and Mr. Adelman testified that it was necessary to have sales figures going back to 1935 for these products or he could not have completed his study of the whole dairy industry. He accomplished this by taking the "implicit census" price for 1954 and projecting it back through 1936, and projecting it forward through 1955. These projections were made by using a figure put out by the International Association of Ice Cream Manufacturers which was not a *price* figure but a *cost* figure. Examination of officials of that Association show that the reporting plants were not selected on any statistically sound basis, but rather were merely firms volunteering to supply their cost figures to the Association; that it was impossible to determine from the underlying data whether the same plant or plants of the same companies were used in each of the years; that the number of plants reporting each year varied; that mellorine and water ices are undisputedly cheaper to produce and sell for substantially less than ice cream, and unless these sample plants produce the same proportions of ice cream and frozen desserts as national production, a substantial distortion would appear in the cash universe.

A chain is no stronger than its weakest link, and it would appear that this is just one more weak link in Mr. Adelman's chain of computations upon which his study of the domestic dairy industry is based.

In arriving at a cash universe for butter, Mr. Adelman first determined the total annual butter production, then selected an arbitrary price which was substantially higher in all cases than the Chicago 92-score price. It was Mr. Adelman's theory that all of the butter sold in the country during each year was sold at a price of from 4 to 5 cents higher than the Chicago Exchange price. The underlying data, however, clearly indicates that in 1954, 1955 and 1956, a substantial amount of the total butter production was purchased under a government price support program at several cents a pound below the price used by Mr. Adelman, but this factor was ignored by him. As a result, this caused a substantial upward bias in the butter universe in most of the years 1949–1958, during which the price support program was in effect.

It is true, as contended by counsel for the respondent, that there is no statutory prohibition against bigness per se, however when, as in this case, the bigness has been attained through the acquisition of the assets or stock of other corporations, we cannot close our eyes to the practical result which is the outcome of such acquisitions, and must take into consideration the size of the acquiring corporation as a result of the acquisition, compared to other units in the industry. The first test to be made of the effect of such an acquisition is the resultant share of the market of the acquiring concern. The economists differ as to how much of a share of a market is necessary for a corporation to enjoy before it attains a competitive advantage over other corporations in the industry. Of necessity, there must be some point in the scale where that share of market is sufficient to give the acquiring corporation such an advantage.

Mr. Turnbow, President of the respondent, in his testimony has listed some of the advantages big corporations have over small corporations in the dairy industry, when he testified that the larger producer in the dairy industry, with larger equipment, has a distinct cost advantage over the smaller processor-distributor; and further:

> He has an advantage in that he is able to do research; he is able to have a control laboratory; he is able to put in equipment that costs a lot of money but will process a larger volume of product. * * * A plant doing much less than 7,000 gallons of milk a day has a very hard time under present laws of paying its farmers and suppliers of product.

He also indicated that economies could be experienced in distribution by having large volume processing. There is ample evidence in the record to show that large, financially strong corporations have many advantages over their smaller competitors: for instance (a) in their ability to obtain adequate financing to expand or extend their operations; (b) to promote their product through national or local advertising; (c) to engage in research; (d) to more readily diversify both product-wise and geographically; and (e) to establish prestige in the eyes of the buying public.

That respondent is now a major factor in those sections of the country where it is found herein that it has made acquisitions which have resulted in a tendency to lessen competition, is indicated in the consolidation of the Federal Milk Order Production figures of respondent from 1956 through 1959, in five areas, when compared with universe figures in those areas. The following table graphically portrays the situation.

IV

Respondent's Fluid Milk Sales Record Measured Against the Total Dairy Industry in Certain Sections of the Country Where Acquisitions Took Place.

Consolidated Federal Market Order Figures for those Federal Market Order Areas in which acquisitions were made that are found to be in violation of Section 7 of the Clayton Act.

1956

	Foremost	Universe	Foremost percentage
Bluefield			
Appalachian	17, 260, 355	65, 576, 220	26. 3
Sioux Falls-Mitchell	9, 493, 719	28, 158, 942	33. 7
North Texas	77, 302, 812	475, 709, 964	16. 2
San Antonio	23, 158, 864	152, 684, 952	15. 2
Total	127, 215, 750	722, 130, 078	17. 6

1957

	Foremost	Universe	Foremost percentage
Bluefield	9, 866, 386	30, 550, 500	32. 3
Appalachian	16, 845, 102	66, 576, 000	25. 3
Sioux Falls-Mitchell	8, 957, 346	28, 324, 000	31. 6
North Texas	77, 423, 440	493, 626, 000	15. 7
San Antonio	21, 804, 471	164, 257, 300	13. 3
Total	134, 896, 745	783, 333, 800	17. 2

1958

	Foremost	Universe	Foremost Percentage
Bluefield	9, 733, 058	30, 055, 400	32. 4
Appalachian	17, 244, 315	70, 252, 300	24. 6
Sioux Falls-Mitchell	8, 659, 120	29, 194, 000	29. 7
North Texas	75, 292, 113	497, 645, 000	15. 1
San Antonio	20, 512, 394	167, 018, 300	12. 3
Total	131, 441, 000	794, 165, 000	16. 6

1959

	Foremost	Universe	Foremost Percentage
Bluefield	10, 002, 765	30, 080, 500	33. 2
Appalachian	17, 075, 001	73, 266, 600	23. 3
Sioux Falls-Mitchell	8, 767, 658	30, 480, 200	28. 8
North Texas	79, 674, 651	507, 379, 800	15. 7
San Antonio	21, 063, 325	174, 950, 700	12. 0
Total	136, 583, 400	816, 157, 800	16. 7

CONCLUSIONS

A. As to the Facts

The acquisition of Western Condensing Company, International Dairy Supply Company, and International Dairy Engineering Company are all conglomerate acquisitions. There is no evidence in the record indicating the competitive condition in the markets in which those corporations did business. Campos Dairy Products, Ltd., Honolulu, Hawaii, a subsidiary of International Supply, was engaged in processing and selling milk in Honolulu when acquired by Foremost. This was a market extension. There is no evidence of adverse effect on competition as a result of this acquisition.

With respect to the acquisition of Blue Moon Foods, Inc., and its subsidiary June Dairy Products Co., Inc., the respondent was not engaged in the manufacture of cheese and there is no evidence as to where it competed with Blue Moon or June Dairy in the sale of cheese. As to the other products which were handled by June Dairy, such as poultry and eggs, there is no evidence that respondent engaged in the sale of such products in competition with June Dairy at the time of the acquisition.

At the time of the acquisition of Florida Dairies, Incorporated, respondent was a substantial factor in the Miami, Florida, market and the acquisition of Florida Dairies tended to give it a decisive competitive advantage over its competitors. The only indication, however, that Florida Dairies was engaged in interstate commerce was in the purchase of dairy products, such as heavy cream, skim milk and cottage cheese, from a wholesaler in Miami who in turn had imported these products from outside the State and they had come to rest in the wholesaler's warehouse before being delivered to Florida Dairies. There is no competent evidence in the record to support the conclusion that Florida Dairies ordered these products before they were shipped from outside the State.

As to Philadelphia Dairies, the only evidence of competition between the respondent and this acquired corporation was in the sale of ice cream in New York City and on Long Island, including the Borough of Brooklyn, New York. There is some evidence that Philadelphia Dairies was a substantial factor in the sale of fluid milk in the Philadelphia market. Its estimated share of the market was 9.3% at the time of the acquisition. There is also evidence in the record that it would rank no more than third in point of volume, and that it had two or three strong competitors in that area in the sale of fluid milk and ice cream so that it could not be concluded that the acquisition of Philadelphia Dairies tended to give respondent a decisive advantage over competitors of Philadelphia Dairies in the Philadelphia market. The competition in the sale of ice cream in New York was not substantial.

As to American Dairies, this was a market extension in fluid milk in that respondent did no dairy business in the areas where American Dairies and its subsidiaries operated. The only evidence of the competitive effect of the acquisition, or the relevant position of the American Dairies at the time of the acquisition, is that in the Neosho Valley, in and around Joplin, Missouri, according to the Federal Market figures of total sales of fluid milk, Foremost after the acquisition had about 18% of the total and this percentage increased in the succeeding years. It is concluded that there is no evidence of adverse effect on competition resulting from the acquisition since there was no competition between respondent and the acquired corporation prior to the acquisition.

With respect to the acquisition of Bridgeman-Russell, Duluth, Minnesota, with branches in North and South Dakota, this was a complete market extension acquisition since respondent was not engaged in the manufacture or sale of any dairy product in those areas at the time of the acquisition. The only evidence as to the relative size or importance of the Bridgeman-Russell operation is that it probably ranked fourth or fifth in the sale of fluid milk in the Duluth metropolitan area. There is no evidence in the record as to the relative importance of the Bridgeman-Russell operation in the North Dakota area or in the Sioux Falls, South Dakota, area, where it operated Dairyland Creamery Co. There is no evidence of adverse competitive effect resulting from this acquisition.

As to the acquisition of the Crescent Creamery Company, Sioux, Falls, South Dakota, this was horizontal so far as fluid milk and ice cream are concerned, since respondent was in that market with Dairyland Creamery Co. The evidence in the record indicates that, as a result of this acquisition, as hereinbefore set forth, respondent gained a decisive competitive advantage over it competitors in that market area or section of the country around Sioux Falls, South Dakota, and there is a probability of a lessening of competition and a tendency to monopoly in that section of the country, particularly in wholesale fluid milk sales to chain store supermarkets.

As to the acquisition of the Portsmouth Pure Milk Company, Portsmouth, Ohio, there is no evidence of competition between respondent and this corporation prior to the acquisition, and it appears that the Pure plant was abandoned soon after it was acquired.

As to the acquisition of Old Hundred, Inc., Southbury, Connecticut, this was an acquisition of an ice cream plant and there is no evidence of competition between it and the respondent, or as to the competitive effect of the acquisition.

As to the acquisition of Moanalua Dairy, Ltd. and Rico Ice Cream Company, Ltd., the Moanalua Dairy acquisition was a horizontal acquisition, since respondent was in the Honolulu market with the Campos Dairy which it acquired at the time it acquired International Dairy Supply Company. Although the Rico Ice Cream Company acquisition might be considered a market extension as Foremost had not sold ice cream in Honolulu prior to its acquisition, it was in fact complementary to the Moanalua milk business and cannot be separated. As a result of the acquisition of Moanalua, it is estimated respondent controlled 30% of the fluid milk market in Honolulu, the principal City of the Island of Oahu, which would give it a decisive competitive advantage in that market.

As to the acquisition of Widemire's, Inc., of Sylacauga, Alabama, there is no evidence of competition between respondent and this company prior to the acquisition, or as to the competitive effect.

Southern Maid, Inc., Bristol, Virginia, acquired by respondent in 1952, had combined milk and ice cream processing plants at Bristol, Virginia and Bluefield, West Virginia, as well as a processing plant for milk alone at Kingsport, Tennessee. In addition to its sales at these plants, Southern Maid also operated distribution branches at

Johnson City and Greenville, Tennessee; Pikesville and Middlesboro, Kentucky; and Richlands and Appalachia, Virginia. This was a horizontal acquisition in the sale of fluid milk and ice cream, since respondent was in two of the same market areas in the Cities of Kingsport and Johnson City, Tennessee, at the time of the acquisition. At the same time the respondent acquired Southern Maid, it also acquired the Welch Milk Company of Welch, West Virginia, where the respondent was not in business. Although Welch was not in the immediate area of Southern Maid, the two companies had the same officers and stockholders and their businesses were conducted as a common operation, therefore, they are being jointly considered herein. The combined business of these two acquired companies apparently has given respondent a definite advantage over its competitors in the section of the country comprising the tri-city market area of Bristol, Kingsport and Johnson City and in the marketing area included in the Federal Milk Order known as the Appalachian Order, which order included the operations of most of the Southern Maid plants and branches and of Foremost in that area, at the time of the acquisition. A second Federal Milk Order known as the Bluefield Order covering the area which had therefore been supplied either by the plants or branches of Southern Maid or by the Welch Milk Company plant at Welch, prior to their acquisition, also indicates respondent has a competitive advantage in the Bluefield area.

With respect to the acquisition of Central Dairies, Inc., Columbia, South Carolina, this was a horizontal acquisition of an ice cream plant, but there is no evidence as to the competitive effect of the acquisition, and the volume of business done in the area by Central Dairies was de minimis.

As to the acquisition of the Gunn Ice Cream Company, Pensacola, Florida, there was very little, if any, competition between respondent and this company, and the effect of such acquisition was de minimis.

The Graham Dairy, Inc., Miami, Florida, acquisition, was a horizontal acquisition in fluid milk since respondent was in the Miami area prior to the time of the acquisition. Graham Dairy's share of the market was 3% and the respondent's was 8%. Since there were three or four larger distributors in the Miami market, the acquisition did not give Foremost a decisive advantage over its competitors in that market.

The acquisitions of Banner Dairies, Inc., Abilene, Texas; Tennessee Dairies, Dallas, Texas; and Phenix Dairy, Houston, Texas, were for the most part horizontal and tended to give respondent an advantage over its competitors in four market areas or sections of the country, namely, Dallas-Fort Worth, Abilene, San Antonio and Houston, and also indicated a tendency toward substantially lessening competition in the sale of fluid milk and ice cream throughout the State of Texas.

The acquisition of Golden State Company, Ltd., San Francisco, California, was a horizontal acquisition for substantial areas in the State and the acquisition gave the respondent a decisive competitive advantage over its competitors in four market areas or sections of the country, namely, Alameda-Contra Costa, San Francisco, San Mateo and Santa Clara as to fluid milk, and had a tendency to substantially lessen competition in the entire State of California in the sale of fluid milk and ice cream.

The acquisition of Marin Dairymen's Milk Co., Ltd., San Francisco, California, in May 1953, was a market extension acquisition as Foremost was not in competition with it in any market prior to the acquisition.

The Ive's Dairy, Incorporated, Miami, Florida, acquisition, was a horizontal acquisition like Graham's which respondent had previously purchased. The acquisition did not give respondent a decisive advantage over its competitors in the Miami area.

With respect to the acquisition of the De Soto Ice Cream Division of Armour and Company, Minneapolis, Minnesota, this was a horizontal acquisition since the respondent was engaged in the manufacture and sale of ice cream in Minneapolis at the time the De Soto business was acquired, having bought the Ive's Creamery Co. about a month before. However, there is not sufficient evidence of the competitive effect of the acquisition to warrant a finding that there was an adverse effect upon competition between the two corporations or upon competition in the ice cream industry in that area.

As to the acquisition of the Ive's Creamery Company, doing business in Minneapolis, Minnesota, and other places in the State of Minnesota, at the time of the acquisition respondent was not engaged in the manufacture and sale of ice cream in that area, so that it was a market extension. As a result of the acquisition of Ive's and De Soto and Vander Bie's, a smaller company, all within a few months time and considered as a package deal, respondent was ranked as fourth in the Minneapolis ice cream market behind Kemp's and Crescent, jointly owned, in first place; Northland Ice Cream & Milk Company, in second; and Bridgeman-Land-O-Lakes in third. Therefore it cannot be concluded that the combined De Soto-Ive's acquisitions tended to give respondent a competitive advantage in the sale of ice cream in the Minneapolis area.

B. As to the Law

1. *Violation of Section 5 of the Federal Trade Commission Act.*

The following is the position of the hearing examiner with respect to the allegations in the complaint as to violation of Section 5 of the Federal Trade Commission Act, and the jurisdiction of the Commission in the premises.

This question first came up in the initial hearing at which time the hearing examiner ruled against the attorneys in support of the complaint: "on any attempt to enforce Section 5 of the Federal Trade Commission Act." At that time he granted a motion to strike from the complaint that portion referring to Section 5, stating:

> It seems to me that when Congress amended Section 7 and gave us additional authority, that it was intended to confine our activities to that section. We have been turned back every time we have attempted to use Section 5 as a substitute for Section 7, or as a complement to it, or a supplement to it, and I think it is a waste of time and effort and money.

This is not the first time that the Federal Trade Commission has attempted to utilize Section 5 of the Federal Trade Commission Act in preventing acquisitions of competitors. The first instance was where, in the case of Western Meat Company vs. Federal Trade Commission (1 F. 2d 95), consideration of the Commission's complaint and order to cease and desist by the United States Circuit Court of Appeals in 1924, the Court held that the acquisition of the capital stock of the Nevada Power Company violated Section 7 of the Clayton Act and that the conclusion of the Commission that the acquisition constituted a violation of Section 5 of the F.T.C. Act was also proper. On a rehearing, this Court modified the Commission's Order of Divestiture but the only mention of the Commission's Order under Section 5 of the Federal Trade Commission Act that was made to limit the Commission's power to the issuance of an order to cease and desist from using unfair methods of competition. However, when the case was before the Supreme Court on a writ of certiorari from the second hearing of the case in the Court of Appeals (4 F. 2d 223), Mr. Justice McReynolds, speaking for the majority of the Court, analyzed Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and the relation between these two sections. He stated:

> Section 5 of the Act to create a Federal Trade Commission, approved September 26, 1914, c. 311, 38 Stat. 717, 719, declares unfair methods of competition in commerce unlawful, prescribes the procedure to be followed, and gives the Commission power to require an offending party to cease and desist from such methods. *This section is not presently important;* the challenged orders sought to enforce Section 7 of the Clayton Act. (272 U.S. Code 554, 557) [Italic supplied.]

In April 1924, the Commission issued a complaint against the Eastman Kodak Company, et al. (7 F.T.C. 434), charging a violation of Section 5 of the Federal Trade Commission Act and, as a result, an order was entered by the Commission requiring the respondent, among other things, to cease and desist from conspiring to restrain competition in the manufacture and sale of certain film stock and to maintain and extend the monopoly of the Eastman Kodak Company by "The acquisition and equipment by the Eastman Kodak Company of the Paragon Laboratory, the G. M. Laboratory and the Sen Jacq Laboratory"; by the use by the Eastman Kodak Company of the ownership and possession of said laboratories in the production of certain films; and by the continued ownership by Eastman Kodak of the said laboratories.

It was further ordered:

That for the purpose of preventing the maintenance and extension of the monopoly of the Eastman Kodak Company in the manufacture and sale of positive raw cinematograph film stock to the use thereof in making positive prints of cinematograph films and of restoring competitive freedom in the distribution and sale of positive raw cinematograph film stock, the Eastman Kodak Company shall, with all due diligence, sell and convey the said Paragon, G. M. and Sen Jacq laboratories to parties not connected directly or indirectly in interest with the Eastman Kodak Company.

This order of the Commission was reviewed by the United States Court of Appeals for the Second Circuit which rendered its decision in May 1925 (7 F. 2d 994). One of the questions which that Court had to decide was whether or not the Commission had authority to require the Eastman Kodak Company to sell the laboratories, procured as described in the findings, to someone "not connected directly or indirectly in interest" with itself. The Court held:

With the first proposition we do not agree, and hold that since corporate power exists, it was not and is not unlawful for Eastman Kodak Company to equip itself for or to enter upon the business of making pictures; but it was and is unlawful for the Commission to order that Company to divest itself of the factories or laboratories so lawfully acquired.

The Commission is not a court; it exercises administrative not judicial power (National Harness Ass'n, etc. vs. Federal Trade Commission, 268 F. 705; Chamber of Commerce vs. Federal Trade Commission, 280 F. 745) and no statutory grant can be found justifying the order that a citizen sell property acquired in the course of business.

But even if the Commission had the power of a court, as exercised in the cases relied on (Standard Oil vs. United States, 221 U.S. 1; United States vs. American Tobacco Co., 221 U.S. 106) there was no basis for exercise of power. The sole object of Commission action was to prevent unfair competition, but there was nothing unfair in the kodak company going into the business of making pictures; on the contrary it is fundamental just now in this country that competition is holy, the more we have the better persumably are we off; therefore the act of getting ready to compete in the picture making art, was under our statutes positively meritorious, and no court could have prevented what was done.

In that case, Judge Manton dissented in part, taking the position that:

While the Commission is not a court, and exercises no judicial power, it has the power in the proper case to order a respondent to dispose of property acquired by it which it is found using as a means to unfair competition in trade. Indeed, it may order the disposing of the plant or property which it uses in part or whole in creating a monopoly.

The Eastman Kodak case was considered by the Supreme Court of the United States, and was decided in May 31, 1927 (274 U.S. 619). In its consideration of the question of whether the Commission had authority to issue an order requiring the Eastman Company to sell and convey its laboratories to other parties, that Court held:

The proceeding before the Commission was instituted under Section 5 of the Federal Trade Commission Act, and its authority did not go beyond the provisions of that section. By these the Commission is empowered to prevent the using of "unfair methods of competition" in interstate and foreign commerce, and, if it finds that "any unfair method of competition" is being used, to issue an order requiring the offender "to cease and desist from using such method of competition". The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. [Citing the same cases as cited by the Lower Court] It has not been delegated the authority of a court of equity. And a Circuit Court of Appeals on a petition to review its order is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission; such review being appellate and revisory merely, and not an exercise of original jurisdiction by the court itself.

The question here presented is, in effect, ruled by Federal Trade Commission vs. Western Meat Company (272 U.S. 554, 561, 563), in which the decisions in Federal Trade Commission vs. Thatcher Manufacturing Co. (CCA 5 F. 2d 615) and Swift and Co. vs. Federal Trade Commission (CCA 8 F. 2d 595), that were relied upon by the Commission in its petition for the writ of certiorari, were reversed by this Court. In that case it was held that—although the Commission, having been granted specific authority by Section 11 of the Clayton Act to require a corporation that had acquired the stock of a competitive corporation in violation of law "to cease and desist from such violations, and divest itself of the stock held", might require the corporation to divest itself of such stock in a manner preventing its use for the purpose of securing the competitor's property—it could not, after the corporation by the use of such stock had acquired the property of the competitor, require it to divest itself of the property thus acquired so as to restore the prior lawful condition. As to this we said: "The Act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held. The purpose of the Act was to prevent continued holding of stock and the peculiar evils incident thereto.

If purchase of property has produced an unlawful status, a remedy is provided through the courts." And they "must administer whatever remedy there may be in such situation." Distinct reference was there made (p. 561) to Section 15 of the Clayton Act, where express provision is made for the invocation of judicial remedies as need therefore may arise.

So here, the Commission had no authority to require that the Company divest itself of the ownership of the laboratories which it had acquired prior to any action by the Commission. If the ownership or maintenance of these laboratories has produced any unlawful status, the remedy must be administered by the courts in appropriate proceedings therein instituted.

Mr. Justice Stone filed a rather strong dissenting opinion, indicating that the case could not be disposed of without determining whether the acquisition and retention of the film laboratories by the Eastman Company, under the circumstances disclosed by the record, constituted in itself or was a part of or a step in an unfair method of competition. Mr. Justice Brandeis joined Mr. Justice Stone in the dissent.

It was nearly thirty years later before the Commission made another attempt to utilize Section 5 of the Federal Trade Commission Act in requiring a respondent to cease and desist from acquiring or attempting to acquire any ownership of capital stock or properties of competitors. In the case of National Lead Company vs. Federal Trade Commission, decided in the Seventh Circuit in 1955, respondents were charged with violations of Section 5 of the Federal Trade Commission Act and Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The Commission found that the National Lead Company had violated Section 5 of the Federal Trade Commission Act and

ordered the Company to cease and desist from acquiring or attempting to acquire any ownership of the capital stock, or properties of any of its competitors in the lead pigment field. (227 F. 2d 825, 837)

Concerning this order, the Court of Appeals stated:

Irrespective of the Commission's power under Section 5, we think the order so wanting in evidentiary support and so arbitrary that it cannot stand in any event. Therefore, we do not consider the Section 5 question.

In that case, the complaint had charged and the Commission had found that the National Lead Company had, beginning in 1891, engaged in acts tending toward substantial control of and a monopoly in the lead pigment industry in violation of Section 5 of the Federal Trade Commission Act; accordingly, it had ordered the company to cease and desist from acquiring or attempting to acquire any ownership of the capital stock or properties of any of its competitors in the lead pigment field. The court then went on to point out that the Commission had found that National was incorporated in 1891, effecting a merger of some 16 companies engaged in pigment production, and that between that date and the mid 1930's, it had acquired the properties of more than 30 other producers. From 1931 to about 1935, National had made several attempts to acquire the facilities of its largest competitor.

The Court pointed out that the ultimate finding of incipient monopoly was based on those findings as to transactions in the growth of petitioner to a dominant position in its field.

We find the assertion that occurrences concluded more than twenty years before the order was entered can justify a *perpetual injunction against any future acquisition of stock or physical assets of National's competitors a startling one.* The Commission stated that it had not considered the question of possible antitrust violations in petitioner's growth from 1891 to the middle 1930's. Nevertheless, it relied on findings which can have no purpose save possibly to prove that a monopoly already exists to support its order which is geared solely to prevention of monopolistic practices at some undisclosed future date. * * * [Italic supplied.]

We are not here concerned with judicial pronouncements that the Commission has authority to determine the scope necessary in a cease and desist order to prevent violations of the Act. That principle assumes a present violation of the Act. in which case the Commission is given wide latitude in framing its order to compel compliance with the Act.

But such is not the case before us. The Commission has concluded from its findings of past activities, which may have had monopolistic overtones long ago, that petitioner presently harbors a desire to swallow up all competition and that, at some undisclosed time in the future, it intends to do so. Presumably the evidence of this intent is too delicate to stand the light of day, since it cannot be found in the record. Drafted on this basis, the order before us seeks to spank the child, not for naughty acts done or threatened, but on the general principle that he, may somewhere, somehow, in the future engage in mischief. This presumes the existence of a power even broader than that residing in a court of equity.

This case went to the Supreme Court of the United States, which in its decision handed down February 25, 1957 (352 U.S. 419), did not discuss the question of the power of the Commission to require the respondent to cease and desist from acquiring any of its competitors. It did, however, reaffirm what it had previously said in the Western Meat Case, supra, that "The Commission may exercise only the powers granted it by the Act."

Counsel in support of the complaint in the present case has indicated, during the course of trial, that there were remedies under Section 5 that were not foreclosed by the Eastman Kodak Case; for example, "The one possible remedy would be to cease and desist from making any further acquisitions, corporate or non-corporate, in commerce or not in commerce." This contention must be based on the

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assumption that the Commission has more power under Section 5 of the Federal Trade Commission Act than it has under Section 7 of the Clayton Act, an assumption which is not supported by either court decisions or by logic. If the Commission had such power, under Section 5, why was it necessary for Congress to enact Section 7 of the Clayton Act in 1914, or amend it in 1950? Congress, in its wisdom, has amended the Clayton Act to make sure that the Commission does not interfere with the business transactions of small units in any industry, by requiring that the Act be restricted in its application to corporations engaged in commerce, and further, that the acquisition is unlawful only where the effect may be: "substantially to lessen competition or tend to create a monopoly" in any line of commerce in any section of the country. This last requirement is admittedly intended to make the law applicable only to transactions having a substantial effect on competition in any given market, and not to apply to inconsequential acquisitions; that is, acquisitions which have an inconsequential effect on competition.

Furthermore, any cease and desist order entered by the Commission under Section 5 would necessarily be restricted to unfair practices or methods which it had found respondent to be engaged in at some time in the recent past. As indicated in the National Lead case, it has to be assumed by the Commission that the respondent is going to continue the activities of acquiring corporations where the acquisitions would be in violation of law. What good would it do to require a respondent corporation to cease and desist acquiring corporations, unless it could be shown that the effect of such acquisitions would violate Section 7 of the Clayton Act which Congress intended to apply to such transactions? The Court of Appeals correctly summarized the situation in the last quotation given from the National Lead case.

2. *Violation of Section 7 of the Clayton Act.*

In order to establish a violation of Section 7 of the Clayton Act, it is incumbent upon counsel in support of the complaint to establish:

a. The relevant lines of commerce.

b. The relevant sections of the country.

c. That the acquired concern is a corporation engaged in interstate commerce in the relevant line of commerce.

d. That the acquisition or acquisitions cause the requisite adverse effect upon competition or tendency toward monopoly.

(1) *The relevant lines of commerce.*

It is found first that the overall line of commerce as alleged in the complaint is "dairy products", defined as including "one or any number of the following products: milk, cream, ice cream, cheese, butter, eggs, canned fresh milk, and evaporated milk." This allegation was admitted in respondent's answer. Respondent denied the allegation that said products were distributed "to retail consumers and to stores, restaurants, hotels and other miscellaneous outlets."

It is further found that, within the intent and meaning of Section 7 of the amended Clayton Act and the foregoing allegations of the complaint, the processing and sale of fluid milk (whole milk, skim milk, buttermilk, flavored milk, mixtures of milk and cream, light cream and heavy cream) at wholesale and retail is a relevant line of commerce involved in this case.

It is also found that, within the intent and meaning of Section 7 of the amended Clayton Act and the foregoing allegations of the complaint, the manufacture and sale of frozen dairy products, including ice cream at wholesale, is another line of commerce involved herein. The selling of ice cream at retail to the consumer is a separate line of commerce.

It is also found that, within the intent and meaning of Section 7 of the amended Clayton Act and the foregoing allegations of the complaint, the manufacture and sale of butter, cheese, eggs, canned fresh milk and evaporated milk, respectively, are relevant lines of commerce involved herein.

Reference is made to United States vs. E. I. du Pont de Nemours and Company, et al., 353 U.S. 586, 594–595, as authority for the foregoing finding. The Supreme Court held:

> * * * in order to determine the existence of a tendency to monopoly in * * * any * * * line of business the area or areas of existing effective competition in which monopoly power might be exercised must first be determined. * * *
>
> Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition." Substantiality can be determined only in terms of the market affected. The record shows that automobile finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a "line of commerce" within the meaning of the Clayton Act. Cf. Van Camp & Sons Co. v. American Can Co., 278 U.S. 245. Thus, the bounds of the relevant market for the purposs of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics.

Applying the test in that case to the facts in this case, it is believed that the separate dairy products, as found above, have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other dairy products to make each of them a "line of commerce" within the meaning of the Clayton Act."

(2) *The section of the country.*

The relevant "sections of the country" are those areas of competition in numerous local markets throughout the country where there is an "area of effective competition" in the products included in the lines of commerce hereinbefore indicated. The House Committee on the Judiciary in referring to this question stated:

> The test of substantial lessening of competition or tending to create a monopoly is not intended to be applicable only where the specified effect may appear on a Nation-wide or industry-wide scale. The purpose of the bill is to protect competition in each line of commerce in each section of the country.[1]

In the Bethlehem Steel case, 168 Fed. Supp. 576, 588–589, 592–593, it was held:

> The parties also differ on the appropriate relevant sections of the country for appraising the effects of the merger on competition. However, they appear to agree with the view expressed by the Senate Committee that "section of the country" is not capable of rigid definition and that in application a section of the country will vary according to the particular facts of each case. The Senate Committee Report[2] states:
>
> "Although it is, of course, impossible to define rigidly what constitutes a "section of the country", certain broad standards reflecting the general intent of Congress can be set forth to guide the Commission and the courts in their interpretation.
>
> "What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk.
>
> "As the Supreme Court stated in Standard Oil Co. v. U.S. (337 U.S. 293), 'Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition.'
>
> "In determining the area of effective competition for a given product, it will be necessary to decide what comprises an appreciable segment of the market. An appreciable segment of the market may not only be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country.
>
> "It should be noted that although the section of the country in which there may be a lessening of competition will normally be one in which the acquired company or the acquiring company may do business, the bill is broad enough to cope with a substantial lessening of competition in any other section of the country as well."

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[1] H.R. Report No. 1191, 81st Congress, 1st Session, page 8.

[2] Senate Report No. 1775, 81st Congress, 2nd Session, pages 5 and 6.

In the present case there are a number of sections of the country involved. For instance, in the acquisition of Tennessee Dairies, Dallas, Texas, there are certain metropolitan areas which are recognized as sections of the country where the acquiring and the acquired corporation were engaged in the dairy business and the effect of the acquisition in those cases could be fairly well determined. Insofar as fluid milk is concerned, the record demonstrates that it is ultimately delivered to customers from plants and branches in route trucks within certain prescribed areas of from sometimes 40 to 60 miles from the plant, but in other instances as high as 300 miles from the processing plant, depending upon population density. With respect to ice cream, however, due to the nature of the product and the broader markets therefor, and the ability of the manufacturers to make deliveries at points farther removed from the point of manufacture, the section of the country may be a larger area than with respect to fluid milk. As pointed out in the Bethlehem Steel Case, supra, which quoted from the Senate Report: "What constitutes a section will vary with the nature of the product. * * * A section which would be economically significant for heavy, durable products, such as large machine tools, might well be meaningless for a light product, such as milk."

In the light of the foregoing quotation from the Bethlehem Steel case, not only are the respective local milk market areas, sections of the country but as to ice cream, larger divisions of the United States, or the total United States market, might be considered a section of the country.

(3) *Interstate commerce.*

With respect to the interstate commerce requisite, Section 7 of the Clayton Act, as hereinbefore indicated, requires that both the acquiring corporation and the acquired corporation should be engaged in interstate commerce. It is contended, by counsel for the respondent, that under this definition both corporations must be engaged in the sale in interstate commerce of the particular product involved in the proceeding.

The statute does not so provide, and no decisions have been cited which would support that contention. The complaint in this case is sufficiently broad to include the purchase of dairy products in interstate commerce to qualify the corporation as being engaged in commerce. One illustration is the case of Tennessee Dairies, Inc., which operated a milk processing plant in Dallas, Texas, and sold, only in Texas, milk which it had purchased locally and milk, butter and cottage cheese purchased from a supplier in Missouri. The materials or products thus purchased are processed or manufactured by Tennessee

Dairies in Texas into different forms or other products or re-packaged in different, smaller containers bearing the trade-names and marks of the acquired corporation. Certainly that corporation was engaged in interstate commerce. It purchased raw materials in one state and sold them to the public in another state, and the changes that may have taken place in the form of the product did not destroy the interstate character of the transaction.

A second illustration was given by counsel for the respondent, however, namely, Florida Dairies, Inc., which operates a processing plant in Miami and sold only in Florida, purchases of heavy cream, condensed skim milk and cottage cheese which it purchased from a wholesale supplier operating a warehouse in Miami, who had previously purchased those items from another supplier outside the State of Florida. Here it is not so clear that Florida Dairies is engaged in interstate commerce, since it appears that all the dairy products which it purchased for resale were purchased from local producers or suppliers. In the absence of proof that the product purchased from the wholesale supplier operating a warehouse in Miami was shipped directly from the processor outside the State to Florida Dairies, Inc., upon a previous order, so there was no break in the transportation of the product to Florida Dairies from outside the State, more than was necessary for the purpose of completing the transaction, such as temporary storage and delivery, the interstate character of the transaction is doubtful. If those products purchased from the wholesale supplier locally in Miami had come to rest in that warehouse, and had been so mingled with their other products that they lost their original interstate identity, it is not believed that Florida Dairies can be said to be engaged in interstate commerce in any sense of the word. There is a distinction between the facts in the Florida Dairies case and the Tennessee Dairies case which it is believed is controlling, and that is, with respect to Tennessee Dairies, it was regularly engaged in the purchase of dairy products, such as milk, butter and cottage cheese, from suppliers located outside the State and the products were shipped direct to Tennessee Dairies. Even though Tennessee Dairies may have changed the form of package, their products only came to rest in the warehouse of Tennessee Dairies long enough to have such change in form take place, and then to be delivered to the ultimate customer, that is, the retail dealer to whom the products are sold, or perchance to the consuming public, by retail home delivery trucks. In such case, the interstate transaction was not completed until that sale was made.

Upon further consideration, for the reasons stated above, it is found that Florida Dairies, Inc., in Miami, hereinbefore mentioned in this decision, was not engaged in interstate commerce within the intent and meaning of Section 7 of the Clayton Act. As to all of the other acquisitions, hereinbefore discussed and referred to in the findings of fact, the contentions of respondent with respect to interstate commerce are rejected. Particular reference is made to Central Dairies, Inc., Columbia, South Carolina; Crescent Creamery Co., Sioux Falls, South Dakota; Portsmouth Pure Milk Company, Portsmouth, Ohio; Phenix Dairy, Houston, Texas; Tennessee Dairies, Dallas, Texas; Banner Dairies, Abilene, Texas; Marin Dairymen's Milk Company, Ltd., San Francisco, California; and Golden State Company, Ltd., San Francisco, California. As to Golden State, the record is clear that it purchased some of the dairy products which it resold from manufacturers outside the State of California. It is not believed that Section 7 of the Clayton Act requires that such a narrow construction as counsel for the respondent places upon such transactions, as hereinbefore indicated, is tenable.

(4) *Probable adverse effect upon competition or tendency toward monopoly.*

(a) Horizontal Acquisitions.

Section 7 of the Clayton Act provides in part that an acquisition of a corporation engaged in commerce is illegal where in any line of commerce, in any section of the country, "the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly." The words "may be," as used in this Section, require proof of a reasonable probability that the acquisition will have the proscribed effect. The showing of a mere possibility is not sufficient. This was made clear in the report of the Senate Committee, No. 1775, supra, page 6. That report states:

> The words "may be" appear in the bill in defining the effect on competition of the forbidden acquisitions. Acquisitions are forbidden only where in any line of commerce in any section of the country the effect "may be" substantially to lessen competition or to tend to create a monopoly.
>
> The use of these words means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed effect, as determined by the Commission in accord with the Administrative Procedure Act.

Consideration will be given first to horizontal mergers, that is, the acquisition of corporations which, at the time of the acquisition, were in competition with the respondent in the sale of one or more dairy products. In the Bethlehem Steel Case, supra, citing Congressional

Committee reports, it was held that the major objectives of Section 7 of the Clayton Act, as amended, are:

(1) to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions; (2) to meet the threat posed by the merger movement to small business fields and thereby aid in preserving small business as an important competitive factor in the American economy; (3) to cope with monopolistic tendencies in their incipiency and before they attain Sherman Act proportions; and (4) to avoid a Sherman Act test in deciding the effects of a merger.

In determining the effect of any of the horizontal acquisitions of the respondent, it is important to consider the opinion of the House Committee at the time it reported on this amended Section 7, when it stated the purpose of the amendment as follows:[1]

[Section 7] is intended [to apply] when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize.

The United States District Court in the Bethlehem Steel Case, supra, in interpreting the amended Section 7, in this respect, stated:

A horizontal merger can affect competition in at least two ways. It can have an impact not only on the competitors of the merged companies but also on the buyers who must reply upon the merged companies and their competitors as sources of supply. The purpose of Section 7 is to guard against either or both effects of a merger—if the likely consequence is substantially to lessen competition or to tend to create a monopoly. The Section 7 market must therefore be considered with reference to the two groups—(1) the competitors of the merged companies and (2) the buyers who would be dependent upon the merged companies and their competitors as sources of supply.

The Court then referred to the House Committee report, supra, as follows:

[The proscribed] effect may arise in various ways: (1) such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, (2) increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, (3) undue reduction in the number of competing enterprises, or (4) establishment of relationships, between buyers and sellers which deprive their rivals of a fair opportunity to compete.

In the present case, to determine the full effect of the acquisition of the respective corporations involved, the relevant markets to be considered are as follows:

A. The fluid milk market in (1) the State of Texas; (2) the Dallas, Texas, Metropolitan area, including the City of Fort Worth and the surrounding Counties of Cooke, Collin, Dallas, Delta, Denton, Ellis,

[1] H.R. Report No. 1191, supra, page 8.

Fannin, Grayson, Hopkins, Hunt, Johnson, Kaufman, Lamar, Parker, Rockwall and Terrant; (3) the Metropolitain area in and around the City of Houston, Texas; (4) the Metropolitan area in and around the City of Abilene, Texas; (5) the Metropolitan area in and around the City of San Antonio, Texas; (6) the State of California; (7) the Alameda Contra-Costa Metropolitan area, including the Cities of Oakland, Berkeley and Alameda; (8) the San Francisco Metropolitan area; (9) the San Mateo Metropolitan area; (10) the Santa Clara Metropolitan area; (11) the Honolulu, Hawaii, Metropolitan area; (12) the Sioux Falls, South Dakota, Metropolitan area; and (13) the Tri-City Metropolitan area of Bristol, Virginia, and Kingsport and Johnson City, Tennessee. In connection with the last named area, the area in and around Bluefield and Welch, West Virginia, should also be considered.

Having particular reference to the acquisitions in the State of Texas, it is concluded that the competition which had theretofore existed between the respondent and the respective acquired corporations, namely, Tennessee Dairies, Banner Dairies and Phenix Dairy, in the respective market trading areas, was completely eliminated in each of those markets as a result of the acquisitions. Foremost became a major factor in many of the chain stores and supermarkets in those urban market areas, and the consuming public, buying through them, was deprived of the benefit of the preexisting competition, except in Dallas where Foremost had not previously sold fluid milk. There Foremost acquired substantial chain store supermarket fluid milk business to complement its ice cream business. In each instance, respondent's share of the market in the sale of fluid milk and ice cream was increased, and, where it had not previously been a major factor in the market, it became such as a result of the acquisition and it had a competitive advantage over many of its competitors. In the Abilene market, for instance, Foremost milk is sold in more chain stores than any of its competitors, which has given it a distinct competitive advantage. In the San Antonio market, the acquisition increased the Foremost share of the milk market, but did not raise it to a dominant position, although it became a major factor with approximately 16% of the milk market and increased its gallonage sales quite substantially in the years succeeding the acquisition. In Houston, the acquisition of the Phenix Dairy gave the respondent an increased competitive advantage, since the Phenix Company was one of the largest independent dairies in Texas at the time it was acquired and had substantial sales in chain stores, so that, as a result of the acquisition, respondent was able to control between 17% and 25% of the milk market and was a major factor in the market.

It is contended, by counsel for the respondent, that in each of these four Texas markets, the number of independent competitors has increased since Foremost's acquisition, and that, as a result, the acquisitions have not had the competitive impact that would make them in violation of Section 7 of the Clayton Act, and that, although the total volume of sales of respondent in each of those markets has increased since the acquisiton, its relative share of the respective markets has declined. In order for such phenomenon to have the effect of negating the tendency to lessen competition and to create a monopoly as a result of the acquisition, there would have to be some proof that the new companies entering the market took over a segment of the market as large or larger than respondent had acquired, and there has been no showing to that effect. In all areas, the total volume of sales of fluid milk increased substantially, which accounts for the decline in Foremost's share of the market. Furthermore, complete reliance cannot be placed on postmerger data comparing activities of Foremost and its competitors. The pending complaint and trial might well restrain it from prematurely exercising its increased power to the probable detriment of competition. But such forebearance to use the power to lessen competition does not mean that the merger has not created the power, nor does it mean that the power will not subsequently be exercised by Foremost.

In this connection it is pointed out that in horizontal acquisitions, counsel in support of the complaint are not required to establish with certitude that competition in fact will be substantially lessened. Their burden is met if the proof establishes a reasonable probability that the merger will substantially lessen competition or tend to create a monopoly. As pointed out in the Bethlehem Steel decision, supra:

> "A requirement of certainty and actuality of injury to competition is incompatible with an effort to supplement the Sherman Act by reaching incipient restraints." (citing Senate Report No. 1775, page 6.)

The Court in the Bethlehem Steel decision continued:

> There may be a substantial lessening of competition or tendency to monopoly when a merger substantially increases concentration, eliminates a substantial factor in competition, eliminates a substantial source of supply, or results in the establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.[1]

Further quotation from the Bethlehem Steel decision indicates that an increase in concentration is a major factor:

[1] H.R. Report No. 1191, supra, page 8.

A major purpose of section 7 is to ward off the anticompetitive effects of increases "in the level of economic concentration resulting from corporate mergers and acquisitions."[2] Both the Senate and House Committee Reports emphasized the deep concern of the Congress with the continued trend towards concentration of economic power through mergers and acquisitions.

The three acquisitions in Texas which are found to violate Section 7 of the Clayton Act are the culmination of a series of smaller acquisitions, so that it can be concluded that the cumulative effect of these acquisitions has a definite tendency to substantially lessen competition in the sale of fluid milk in the entire State of Texas, and to create an oligopoly by the respondent and other large processors of milk in the State.

The same reasoning is applied in support of the conclusion that the acquisition of Golden State, in California, by respondent violated Section 7 of the Clayton Act. In that acquisition, not only did the respondent eliminate the competition which had theretofore existed between it and the Golden State Company in the metropolitan areas heretofore named, but also tended to give the respondent a decided advantage over all competitors in the State of California, not only in the production and sale of fluid milk, but also of ice cream. Furthermore, in the California area, there was a definite tendency toward undue concentration in the respondent and three other nation-wide dairy companies: Borden, Carnation and Beatrice. Respondent became the dominant factor in the fluid milk market in all four of the metropolitan areas where there had been competition between it and Golden State prior to the acquisition, and it also became the largest distributor of fluid milk and frozen dairy products, including ice cream, throughout the entire State.

In California, as in Texas, the acquisition of Golden State culminated a series of acquisitions of fluid milk processors and distributors, so that it can be concluded that the cumulative effect of the acquisitions in California also has a definite tendency, not only to substantially lessen competition in the sale and distribution of fluid milk and frozen dairy products which had theretofore existed in various areas within the State, but also to create an oligopoly made up of the respondent and other prominent national dairy concerns. In the recent decision of United States vs. Jerrold Electronics Corp., et al., decided in July 1960 by the United States District Court for the Eastern District of Pennsylvania, the Court held:

The court finds that the evidence presented in this case is not of such a quality that it can fairly say that any one of Jerrold's acquisitions to date,

[2] Senate Report No. 1775, supra, page 3.

when combined with the ones before it, foreclosed a sufficient portion of the market so that there is a reasonable probability that the condemned effects will occur. While the Government is not bound to produce the best evidence possible under most circumstances, divestiture is a harsh and drastic remedy and the Government is obligated to produce evidence from which the court can determine with reasonable accuracy, whether a violation has occurred. While the court does not feel that the evidence permits a determination of sufficient precision to justify divestiture, it is adequate for the court to roughly determine the percentage of the market foreclosed. This figure would be between 1.5% and 10%. * * * These figures indicate that Jerrold's acquisitions are approaching, if not beyond the point where it can be said that it is a reasonable probability that they will have the prohibited effects when they are examined in the context of Jerrold's prominent position in the industry. Therefore, the plaintiff is entitled to the injunctive relief it seeks as to any future acquisitions.

The Court added, under its Conclusions of Law:

The effect of each of the acquisitions by the defendant Jerrold of community television antenna systems and the *cumulative effect of the entire series of said acquisitions* is to foreclose competitors of the defendants from a share of the market in community television antenna system equipment. The effect of any future acquisitions may be to substantially lessen competition and to tend to create a monopoly in the sale and distribution of said equipment in various sections of the United States in violation of Section 7 of the Clayton Act. [Italic supplied.] [1]

The foregoing decision is cited to indicate the consideration this Federal Court gave to the cumulative theory of acquisitions in alleged violation of Section 7 of the Clayton Act.

The acquisition of Moanalua Dairy, Ltd., and Rico Ice Cream Company, Ltd., Honolulu, Hawaii, presents a situation where the respondent was engaged in the business of selling fluid milk in the Honolulu area as a result of its previous acquisition of Campos Dairy Products, Ltd., in 1952 so that the acquisition of Moanalua Dairy constituted a horizontal acquisition, and all competition that had theretofore existed was eliminated and respondent thereafter controlled 30% of the market of fluid milk in that area. Therefore, it is concluded that the effect of this acquisition may be to substantially lessen competition and to tend to create a monopoly in the sale of fluid milk in Honolulu, Hawaii, in violation of Section 7 of the amended Clayton Act.

The same principle applies to the acquisition of the Crescent Creamery Company, a South Dakota corporation, Sioux Falls, South Dakota. The respondent was in that area through Dairyland Creamery, a subsidiary of the Bridgeman-Russell Company, and as a result

[1] Commerce Clearing House, 1960 Trade Cases, Par. 69,784.

of the acquisition of Crescent Creamery, all competition which had theretofore existed between respondent and Crescent was eliminated, and respondent acquired a dominant competitive position in that area. The effect of this acquisition was to substantially lessen competition in the sale and distribution of fluid milk and ice cream in the section of the country in and around Sioux Falls, South Dakota, in violation of the amended Clayton Act.

Also, as to the acquisition of Southern Maid, Incorporated, in Bristol, Virginia, and the Welch Milk Company in Welch, West Virginia, it is concluded that as a result of this acquisition, not only was there a substantial lessening of competition between Foremost and the acquired companies in the sale of fluid milk and ice cream, but respondent became a major factor in the fluid milk market in the Tri-City area of Bristol, Virginia; and Johnson City and Kingsport, Tennessee, and thereby the acquisition tended to create a monopoly in respondent in that area in violation of the amended Clayton Act.

(b) Conglomerate Acquisitions.

Attention will now be given to those acquisitions involved in this proceeding which may be termed conglomerate; that is to say, of corporations that were engaged in businesses in which the respondent was not engaged at the time of the acquisition. In the House Report accompanying the amendment to Section 7 of the Clayton Act, enacted in 1950, supra (page 11), the following language is found:

> Because Section 7, as passed in 1914, prohibited, among other things, acquisitions which substantially lessen competition between the acquiring and the acquired firms, it has been thought by some that this legislation applies only to the so-called horizontal merger. But in the proposed bill, as has been pointed out above, the test of the effect of competition between the acquiring and the acquired firm has been eliminated. One reason for this action was to make it clear that this bill is not intended to prohibit all acquisitions among competitors. But there is a second reason which is to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate, as well as horizontal, which have the specified effect of substantially lessening competition * * * or tending to create a monopoly.

Reference is made at this time to the following acquisitions: Western Condensing Company, Petaluma, California, engaged in the manufacture of dried whey and other milk byproducts; International Dairy Supply Company, Oakland, California, engaged in the manufacture of recombined milk and other dairy products not manufactured by the respondent, and in the sale of such products in foreign commerce and to U.S. military installations in the South Pacific; International Dairy Engineering Company, affiliated with International Dairy, which does some manufacturing of anhydrous fats and milk solids. These are the only genuine conglomerate acquisitions involved in this case. Due to the lack of evidence as to any kind of adverse effect upon competition growing out of the acquisition of these concerns, the only conclusion that can be drawn is that the allegations of the complaint have not been supported by the proof.

There are a number of other acquisitions, however, which have been designated by counsel in support of the complaint as "market extensions", in that they include acquisitions of corporations engaged in the processing and sale of fluid milk and the manufacture and sale of other dairy products, but in a geographical location where the respondent was not engaged in such business prior to the acquisition, so there was no pre-existing competition. The following acquisitions fall within this category: American Dairies, Incorporated, Kansas City, Missouri; Portsmouth Pure Milk Company, Portsmouth, Ohio; Philadelphia Dairy Products, Inc., and a number of its subsidiaries, Philadelphia, Pennsylvania; Ive's Ice Cream Company, Minneapolis, Minnesota; Marin Dairymen's Milk Company, Ltd., San Francisco, California; Widemire's, Inc., Sylacauga, Alabama; Old Hundred, Inc., Southbury, Connecticut; Bridgeman-Russell Company, Inc., Duluth, Minnesota, and a number of its subsidiaries; and Campos Dairy Products, Ltd., Honolulu, Hawaii. While these acquisitions are not in the strict sense of the word conglomerate acquisitions, in so far as the effect upon competition or tendency to create a monopoly is concerned, they must be treated in the same general category, and the same tests should be applied to such acquisitions to determine whether or not they are violations of Section 7 of the Clayton Act.

(c) Market Extension Acquisitions.

Considering first the acquisition of Philadelphia Dairy Products; at the time of this acquisition, Philadelphia Dairy was a substantial but not dominant factor, being probably the third largest seller of fluid milk in the Philadelphia market with about 9% of the fluid milk market in that area. As an example of this type of acquisition, it is contended by counsel in support of the complaint that such an acquisition is a violation of Section 7 of the Clayton Act for the following reasons:

(a) Foremost entered a new area of effective competition.

(b) Foremost obtained, at the time of entry, substantial sales volume and the benefits of an established business.

(c) Included among these benefits were established relationships with buyers who were probably buyers of Foremost's full line of products.

(d) At time of its entry, Foremost became a substantial competitive factor in each new area of effective competition.

(e) Through the use of agreements not to compete, executed by Foremost and the various acquired concerns, or key personnel, Foremost forestalled each of these acquired concerns, or key personnel, as potential competitors in each of the areas of effective competition.

(f) Prior to each acquisition, there existed a substantial number of small competitive units in each area of effective competition in which that acquisition occurred.

(g) As a result of each acquisition, Foremost supplanted the acquired concern as a competitive factor. Foremost was a substantially stronger competitive unit than the unit it replaced. Thus, as a result of the acquisition, each of the small competitive units was confronted with a far stronger competitor. As a direct result of each acquisition, a material change occurred in the competitive structure, and a substantial disparity between these small competitive factors and Foremost was created, all to the detriment of these small competitive units and to the detriment of potential competition.

In opposition to the foregoing contention, counsel for the respondent has pointed out that no effort was made by counsel in support of the complaint to show any actual injury suffered by smaller single plants or independent concerns in the local markets where respondent's acquisitions competed, and that there was no evidence to demonstrate that respondent had attained any advantage over any competitor in such areas as a result of the acquisition.

It is concluded that there is no violation of the Act when the acquisitions involved were in areas where respondent had never been in business, hereinbefore described as market extensions, in the absence of evidence that the corporations acquired by respondent in those respective areas occupied a dominant position in the dairy industry or some segment thereof, or that respondent had used competitive methods, such as was found in The Procter & Gamble Company case, in which the hearing examiner found various practices to have been used by the respondent therein, to expand its business, which demonstrated the existence of undue competitive power in the industry in which the respondent had not been theretofore engaged. It should be noted that in that case, the respondent acquired approximately 45% of the share of the market in liquid bleaches, whereas in none of the market extension acquisitions involved in this proceeding has the respondent obtained such a share in any of the fluid milk or ice cream markets as a result of any such acquisition.

Taking up the contentions of counsel supporting the complaint, it is not believed that the entry by Foremost into a new area of effective competition is per se evidence of either a substantial lessening of competition or a tendency to monopoly, even though, as indicated, Foremost obtained, at the time of the entry, a substantial sales volume and the advantage of an established business. Nor does the fact that Foremost became a substantial, although not a dominant, factor in the new area of effective competition as a result of the acquisition give it a decisive competitive advantage, unless the proof shows that respondent became such a powerful factor that it was able to, and did, utilize monopolistic practices to advance its position in the new area of competition. Not only were there smaller units in each area of effective competition in which the acquisitions occurred, but it also appears that there were a number of competitors larger than, or equal in size to, the respective acquired corporations. Also, even if Foremost was a stronger competitive unit than the unit replaced, this in and of itself is not sufficient to make the transaction illegal in the absence of evidence of the use of unfair practices to expand its business.

It is believed that Congress intended, in the amendment to Section 7 of the Clayton Act, prohibiting acquisitions by a corporation engaged in commerce, of assets as well as stock of other corporations also engaged in commerce, to include only those acquisitions which would have a tendency to substantially lessen competition or tend to create a monopoly in (a) the line of commerce and section of the country in which the acquiring corporation was engaged; or (b) in a section of the country in which the acquiring corporation had not theretofore been engaged, whereby the merger of the two corporations placed the acquiring corporation in such a dominant position that it would have a decisive advantage over its competitors in that other area as a result of the acquisition. This is indicated by a statement of Senator Kilgore in the hearing before the Subcommittee on Anti-Trust and Monopoly of the Senate Judiciary Committee, 81st Congress, 1st Session, page 101, where the milk industry was under consideration, and the acquisition history of the Borden Milk Company was being discussed before the Committee. Senator Kilgore, referring to an acquisition within his knowledge in Huntington, West Virginia, said:

> Borden Milk came in and bought out the dairies. There were two or three outfits operating in there. It could not create a monopoly. They bought an outlet from a dairy company that wanted to sell, who had customers, who had a plant. They came in and bought their plant and proceeded to go into the milk and ice cream business in that community in competition with the others.
>
> I cannot see that that would be a violation of the law, but I can see *where if they had come in and bought out all of the dairies, or if there had been only one*

other dairy and they had bought both of them, then that looks to me like it would be a violation of this law. [Italic supplied.]

Following the line of reasoning indicated above, and the conclusion reached with respect to Philadelphia Dairies, it is believed, by the same reasoning, that the acquisitions of the other companies named at the beginning of this section are not in violation of Section 7 of the Clayton Act.

It is also urged by counsel in support of the complaint that acquisitions, individually or cumulatively, which give rise to the proscribed adverse competitive effect, be declared unlawful without regard to the particular horizontal, vertical or conglomerate characteristics involved. Reference is made in support of this proposal to the language of House Report No. 1191, 81st Congress, 1st Session, page 8. The italic is that made by counsel in support of the complaint in their brief:

Acquisition of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as a result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. *Such an effect may arise in various ways:* such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, *increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises,* or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete.

A number of cases are cited in support of the foregoing contention, including Pillsbury, Crown Zellerbach, Scott Paper and Brillo, among the Federal Trade Commission decisions. Other cases mentioned, not before the Federal Trade Commission, were the American Crystal Sugar Company vs. Cuban American Sugar Co., and United States vs. Brown Shoe Company. All of these cases, however, refer to horizontal acquisitions and, in the case of the American Crystal Sugar Company and the Brown Shoe Company, the products were, in fact, of national distribution, sugar being a commodity used in every household and shoes a commodity in general use by the public everywhere. These products, of course, are not comparable to milk, cream and ice cream, which are perishable and must be consumed, under ordinary circumstances, within a reasonable length of time after production. The field of effective competition is usually local in metropolitan market areas. Such concerns as Foremost and its large nation-wide competitors having multiple plant distribution, are compelled to meet local competition and, while they have an advantage over such local competition, as hereinbefore indicated, it is not such an advantage that it can be measured in national statistics of production and sale of fluid milk and ice cream.

It is contended by counsel in support of the complaint that each acquisition herein has the following common characteristics:

1. The industry in which the acquisition occurred was one which was characterized by a high degree of concentration, and a significant disparity between the dominant concerns and the remaining local, individual competitors.

2. Each acquired concern has been eliminated as a potential competitor.

3. Substantial competitive advantage has accrued to Foremost, the acquirer.

Counsel in support of the complaint also advanced the contention that the cumulation of the second acquisition with the first acquisition, in the series of acquisitions covered by the complaint herein, was productive, on a cumulative basis, of the proscribed adverse competitive effect. Furthermore, each succeeding acquisition, when considered in connection with the acquisitions which preceded it, constituted a further aggregation of competitive power and strength which was reflected in each area in which Foremost competed as well as throughout the industry nation-wide. The following quotation is taken from their brief:

> The examiner is respectfully advised that we do not thrust upon him the burden of selecting a point at which the acquisitional accumulation became unlawful. It became unlawful at its very beginning, that is, acquisition number one plus acquisition number two. This must be the rule, for to delineate the pale of legality at some further point is, by implication, to encourage mergers by the remaining segments of the industry up to the line of demarcation. To do so would be to compound the merger movement within an historically local industry where a cumulative merger in the balance of interests, cannot prevail.
>
> In any event, where cumulation produces the unlawful effect, we contend that the cumulation is unseverable. Once unlawful effect is achieved, the whole cumulative series becomes tainted with an illegality which cannot be cured by partial divestiture.
>
> Because each of Foremost's acquisitions have been part of a continuous and integrated program of expansion, each of them must be evaluated in relation to the others which preceded it, to determine the cumulative results throughout the United States. Only by so considering them, can any realistic view be obtained as to the changes in the competitive structure in the dairy industry which has occurred in "any section of the country" as the direct result of the Foremost acquisitions. Moreover, when this course is followed, the ultimate conclusion of compounded illegality is inescapable.

When considered in this light, the evidence overwhelmingly supports our position that there is a reasonable probability of substantially lessening competition based primarily on change in industry structure as well as the fact that competition has been foreclosed in a substantial share of the line of commerce affected.

In the first place, it shows that *actual* competition has systematically and continuously been eliminated by the acquisitions of Foremost.

Secondly, an increasing share of total national product of fluid milk and frozen desserts are held by the six largest firms (including Foremost). This concentration increase in the dairy industry is directly related to Foremost's program of expansion by acquisition.

Additionally, the evidence conclusively establishes the elimination of *potential* competition. The very existence of the Foremost Dairy empire in many communities must be regarded as a deterrent to those who would otherwise be willing to enter the field. There is, of course, no way to measure the extent of this influence, but it certainly should not be ignored. More importantly, however, the acquisition of the dairy concerns and their assimilation into the Foremost organization forestalled potential competition. The cumulative effect of these mergers was to destroy "potential competition in a way later to make actual competition impossible." (Citing the case of Aluminum Company of America vs. Federal Trade Commission, 284 F. 401, 408.)

Reference is also made to the Jerrold Electronics Case, supra, in support of this theory. However, it should be noted that in that case there was no order of divestiture entered, but merely an injunction to prevent further acquisitions. Counsel in support of the complaint emphasized the fact that the dairy products industry, and particularly the fluid milk and ice cream segments, is dominated by a small number of giants; National Dairy Products Company, Borden Company, Foremost Dairies, Inc., Beatrice Foods, to mention several, and that in addition, the dairy industry is characterized by a number of concerns which operate in captive markets, such as the Lucerne Division of Safeway Stores, which processes and distributes dairy products, particularly fluid milk, to its own captive outlets. Reference is also made to the fact that there are remaining independent fluid milk and ice cream processors located in the various communities throughout the United States, and the point is made that the independent locals are less favorably situated than Foremost, which has reached a nationwide magnitude by virtue of acquisitions, combined with competitive strength which begets further acquisitions.

Finally, it is contended that the competitive thrust of Foremost includes its advertising, its discriminatory pricing, its financing of customers, and its investment in cabinets and equipment which were used by the customers. Reference is then made to House Report 1191, 81st Congress, 1st Session, page 3, in the following language:

Apart from this general effect, the current movement has had the result of raising the level of economic concentration in a number of very specific ways.

In the first place, recent merger activity has been of outstanding importance in several of the traditionally "small business" industries. More acquisitions and mergers have taken place in textiles and apparel and food and kindred products—predominantly "small business" fields—than in any other industries. Furthermore, in certain other industries which have traditionally been considered as "small business" fields (such as steel drums, tight cooperage, and wines) nearly all of the industry has been taken over by very large corporations. Finally, the outstanding characteristic of the merger movement has been that of large corporations buying out small companies, rather than smaller companies combining together in order to compete more effectively with their larger rivals.

Reference is also made to the language of Judge Weber in the Brown Shoe Case, supra:

We can only eat an apple a bite at a time. The end result of consumption is the same, whether it is done by quarters, halves, three-quarters or the whole, and, it is finally determined by our own appetite. A nibbler can soon consume the whole with a bite here and a bite there. So, whether we nibble delicately, or gobble ravenously, the end result is, or can be, the same.

Consideration has been given to the foregoing contentions of counsel in support of the complaint, and while many of them may be applied to the acquisitions which have been found to be illegal in this decision because of adverse effects upon competition in certain market areas and sections of the country, we are unable to agree with all of the contentions. In the first place, there is nothing in any of the decisions, or quoted excerpts from reports of House Committees or Senate Committees, which is in support of the contention that the acquisition of corporations in geographical areas where respondent has never done business is a violation of the statute because of the cumulative effect upon potential competition. Furthermore, there is no language in either decision or Committee report to support their contention that it is not necessary to determine the point at which an acquisition or accumulation becomes unlawful; that it became unlawful at its very beginning, or that where a cumulation of acquisitions produces the unlawful effect, the cumulation is unseverable, or that once unlawful effect is achieved, the whole cumulative series becomes tainted with an illegality which cannot be cured by partial divestiture. The adoption of such a theory would put American business in such a straight jacket that it would be impossible for a corporation, in any industry, to expand by acquiring concerns in other geographical areas. It is our opinion that so long as Foremost, in its program of expansion, went into geographical areas in which it had not theretofore been engaged in the dairy business, and purchased existing processors of dairy products that were not in a dominant position in the relevant market area in point of production and sales or share of market at the time of their acquisition, thereby gaining a decisive competitive advantage immediately in that area, such acquisitions were not in violation of Section 7 of the Clayton Act. In the present case, where Foremost made its mistake was in making further acquisitions in those areas where it had already established itself and where, as a result of such second or third acquisition, it was placed by this cumulative process in a position of leadership and thus gained a decisive advantage over its competitors. It is concluded that these latter acquisitions are the only acquisitions of this type in this particular industry that are in violation of Section 7 of the Clayton Act and that is because of the elimination of substantial competition that existed between the acquired and the acquiring corporations, and the dangerous tendency thereby to create a monopoly or oligopoly in the relevant market area. The illegality of the last acquisition would not necessarily make the first one illegal. It is the cumulative effect upon competition that determines the legality or illegality of the second or later acquisition.

The record does not contain competent evidence to support the contention or proposed finding that respondent, as a result of the acquisitions involved in this proceeding, had engaged in illegal discriminatory pricing; financing of its customers; or investment in cabinets and equipment which were used by its customers. Insofar as the use of national advertising is concerned, the evidence in the record will not support the contention of a competitive advantage existing in the respondent, mainly because national advertising is not a good weapon in obtaining business in local areas. In other words, the experience of the respondent did not support such an alleged advantage. It is true that the officials of respondent contemplated such an advantage at the time they acquired Golden State, but subsequent developments did not support that belief and Foremost has not increased its advertising budget in proportion to the acquisitions, nor is there any evidence indicating that it has utilized national advertising to a greater extent since the acquisition than it did before.

In accordance with the foregoing decision, the following order is entered.

ORDER OF DIVESTITURE

It is ordered, That respondent, Foremost Dairies, Inc., a corporation, and its officers, directors, agents, representatives and employees, shall divest itself absolutely, in good faith, of all stock, assets, properties, rights and privileges, tangible or intangible, including, but not limited to, all contract rights, plants, machinery, equipment, tradenames, trademarks, and good will acquired by Foremost Dairies, Inc., as a result of the acquisition of the stock, share capital, or assets of each of the following named corporations: Banner Dairies, Inc., Abilene, Texas; Phenix Dairy, Houston, Texas; Tennessee Dairies, Inc., Dallas, Texas; Southern Maid, Inc., Bristol, Virginia, and The Welch Milk Company, Welch, West Virginia; Crescent Creamery Co., Sioux Falls South Dakota; Moanalua Dairy, Ltd., and Rico Ice Cream Company, Ltd., Honolulu, Hawaii; and Golden State Company, Ltd., San Francisco, California, together with all plants, machinery, buildings, improvements, equipment, and other property of whatever description that had been added to or placed on the premises of each of the former, above-named corporations by respondent, as may be necessary to restore each of them as a going concern and to establish each of them as an effective competitor in substantially all the same basic lines of commerce in which each of the respective acquired corporations was engaged at the time of their acquisition.

Pending divestiture, Foremost shall not make any changes in any of the above-mentioned plants, machinery, buildings, equipment, or other property of whatever description, which shall impair their present rated capacity for the production of their respective dairy products, or their market value, unless said capacity or value is restored prior to divestiture.

Respondent in such divestiture shall not sell or transfer, directly or indirectly, any of the stock, assets, properties, rights, or privileges, tangible or intangible, acquired, added, modified or placed on the premises of any of the above-named concerns by respondent, to anyone who, at the time of divestiture, is a stockholder of respondent, or to anyone who is or was an officer, director, representative, employee, or agent of, or otherwise, directly or indirectly, connected with, or under the control or influence of, respondent.

It is further ordered, That, in said divestiture, respondent shall not sell or transfer, directly or indirectly, any of the stock, assets, properties, rights or privileges, tangible or intangible, to any corporation, or to anyone, who, at the time of said divestiture, is an officer, director, employee or agent of such corporation, which, at the time of such sale or transfer, is a substantial factor in the dairy products industry, if the effect of such sale or transfer might be to substantially lessen competition or tend to create a monopoly or oligopoly in any one of the said dairy products, in any section of the country.

It is further ordered, That respondent, Foremost Dairies, Inc., shall within six months from the date of the service upon it of this order, submit in writing for the consideration and approval of the Federal

Trade Commission, its plan for carrying out the provisions of this order, such plan to include the date within which compliance may be effected, the time for such compliance to be hereafter fixed by order of the Commission.

OPINION OF THE COMMISSION

By DIXON, *Commissioner:*

The complaint herein charges that the acquisitions since 1951 by respondent, Foremost Dairies, Inc., of certain named corporations engaged in commerce, taken individually or collectively, violated Section 7 of the Clayton Act and that said acquisitions, together with respondent's acquisitions of certain unincorporated concerns violated Section 5 of the Federal Trade Commission Act. The hearing examiner in his initial decision filed December 9, 1960, held that the allegations as to certain of the individual corporate acquisitions were sustained under the Section 7 charge but that the allegations were not sustained as to the other such acquisitions. He ruled that Section 5 has no application in this case. Both sides have appealed.

In order to determine the merits of the respective appeals, it is first necessary to view the acquisitions charged herein against the background of respondent's over-all growth and development, as reflected in the record before us. Thus, the present Foremost Dairies, Inc., a New York corporation, was evolved from its original formation as a Florida corporation, which, in October 1931, succeeded to an earlier corporation known as Foremost Dairy Products Corporation. Between 1932 and 1950, Foremost acquired 41 dairy businesses, expanded its operations into 44 southern communities and increased its annual sales from $1,000,000 to $48,160,059.

During 1951–1955, the period covered by the complaint, Foremost acquired 52 dairy and other businesses. All of the major acquisitions for which sales data are given in the record involved firms with combined sales of $342,446,744 in the year preceding acquisition. The importance of these mergers to respondent's growth is attested by the fact that in 1955 Foremost had sales of $388,068,990. Hence, respondent's 1950 sales of $48,000,000, plus the sales of $342,000,000 of the businesses it acquired during 1951–1955, were almost identical to its 1955 sales. This is unmistakable evidence that respondent's growth between 1950 and 1955 was the direct result of its numerous mergers. Moreover, large companies it acquired likewise had used mergers extensively in their growth. For example, Golden State Company, Ltd., of California, had acquired thirteen companies prior to its acquisition in 1954 by respondent. It is perhaps significant to note at this point that the House Report accompanying amended Section 7 [1] expressed concern because a Federal Trade Commission merger study showed considerable merger activity in the food industry during 1940–1947. That study reported 270 mergers in all industries classified as being in food and kindred products. Yet respondent alone had made over 90 acquisitions (not including the acquisitions made by companies it acquired) up to 1955.

Principally through its successive mergers, respondent has grown to the point where it has become at least the fourth largest dairy farm in the country. On its face, therefore, respondent's merger pattern is one which we must scrutinize carefully to determine whether its acquisitions violate the Congressional intent behind amended Section 7. This is particularly true in view of the decline in the number of small dairy businesses and in light of certain technological and market changes in the dairy industry which will be discussed in more detail later in this opinion.

We begin our scrutiny with the realization that Section 7, as amended, was designed to prevent one company or a group of companies from using mergers to distort irrevocably market structures in small business industries. We are well aware that it is during times of economic change that many industries have been transformed via mergers from relatively competitive ones to oligopolistic ones because public understanding was not alerted in time to curb such developments. It is apparent from a careful reading of the legislative history and court interpretations that Section 7 is concerned precisely with such industries. As the court stated in the *Crown Zellerbach* case: [2]

> Anyone attempting to formulate the test to be applied in determining whether a given merger is one whose effect "may be substantially to lessen competition, or to tend to create a monopoly" should begin with the reading of the House and Senate Reports that accompanied the bill which brought about the amended section. Thus the House Report contained an extensive discussion of the evils of business concentration. It noted 445 corporations owned 51 percent of the country's gross assets. In many great industries three or four firms controlled most of the business. Thus concentration was still increasing, and much of this was through mergers. Small industries, small businesses, were rapidly being wiped out by mergers through which they were being absorbed by big firms. Those in charge of the bill considered that "these mergers are usually the forerunners of collectivism and socialism", and noted the lessons from other

[1] H.R. Report No. 1191, 81st Cong., 1st Sess., page 3 (1949).

[2] *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800 (9th Cir. 1961).

countries where opportunity had been vested in the hands of a few: "the result has been that either socialization or a totalitarian form of government has taken over".

In the *Bethlehem Steel* case,[3] Judge Weinfeld stated as follows concerning the legislative background of amended Section 7:

> A fair reading of both the Senate and House Committee Reports leaves no doubt as to its [Section 7, as amended] major objectives. As stated in those Reports they were, in some instances haec verba, (1) to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions; (2) to meet the threat posed by the merger movement to small business fields and thereby aid in preserving small business as an important competitive factor in the American economy; (3) to cope with monopolistic tendencies in their incipiency and before they attain Sherman Act proportions; and (4) to avoid a Sherman Act test in deciding the effects of a merger.

The legislative history further indicates that Section 7 was designed to intervene in the "cumulative process" by which a competitive industry may be completely transformed as a result of successive mergers.[4]

The foregoing discussion reflects the need for reviewing mergers of an acquiring concern in their industrial contexts. This requirement was emphasized by the court in the *Brown Shoe* case [5] when it stated:

> Certainly it is evident that Congress intended to encompass minute acquisitions which tend toward monopoly and to do so in their incipiency. Courts have recognized the necessity to act toward violations as they begin, rather than wait until it has become a *fait accompli.* See *duPont* and *Bethlehem Steel* cases, *supra.*
>
> In a determination of these factors it becomes necessary to review, not only the practices of the companies involved, but also the trends in the industry.

The Congressional expressions and the decisions quoted above have special relevance for this case. The legislative reports indicate special concern with the trends then already under way in certain industries.

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[3] *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576 (S.D. N.Y. 1958).

[4] "Acquisitions of stock or assets have a cumulative effect, and control of the market sufficient to constitute a violation of the Sherman Act may be achieved not in a single acquisition but as a result of a series of acquisitions. The bill is intended to permit intervention in such cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize. Such an effect may arise in various ways: such as elimination in whole or in material part of the competitive activity of an enterprise which has been a substantial factor in competition, increase in the relative size of the enterprise making the acquisition to such a point that its advantage over its competitors threatens to be decisive, undue reduction in the number of competing enterprises, or establishment of relationships between buyers and sellers which deprive their rivals of a fair opportunity to compete." (H.R. Report No. 1191, *supra,* page 8.) See also Senate Report No. 1775, 81st Cong., 2nd Sess., page 5 (1950).

[5] *United States* v. *Brown Shoe Company,* 179 F. Supp. 721 (E.D. Mo. 1959).

They viewed with concern the demise through mergers of many businesses in the "traditionally" small business industries; and the House Report specifically mentioned "food and kindred products" as one of the industries it had in mind.[6] The dairy industry is one of the leading hold-outs of the small business segment of the food industries.

We come, therefore, to a consideration of the competitive situation existing in that industry. Both respondent and counsel supporting the complaint emphasize that substantial and far-reaching technological and market changes have occurred in the dairy industry in recent decades. On many points they agree. Until recent decades many producer-distributors operated in the various markets located throughout the country. Much of the remainder of the industry was composed of single plant independent dairy concerns. Technological changes favoring larger scale processing plants, public health regulations setting higher quality standards, bonding of milk plants to insure payment of producers, the advent and expansion of Federal and State marketing orders, all conspired to work against the small processor. The result has been a substantial and continuing decline in the number of independent dairy firms. Although respondent and counsel supporting the complaint agree on this point, they disagree as to the extent and implications of this decline on competition in the various local markets. While the statistical information in this record on all of the local markets is not complete, there is sufficient evidence to permit portraiture of the broad industrial transformation occurring in this industry.

Respondent and counsel supporting the complaint agree that the day of the old-time producer-distributor with a few cows and a delivery route has passed. He has become an economic anomaly outmoded by progress. The evidence as to the extent of decline in the number of independent processors, quite apart from the number of producer-distributors, is somewhat clouded. Here too, however, the number clearly has declined. In California, one of the largest growing areas of dairy product consumption, the number of milk processing plants declined by 70 between 1952 and 1957. Similarly, between 1950–51 and 1956–57 the number of concerns located in Florida selling fluid milk declined substantially. This decline is especially remarkable considering it occurred in one of the country's most rapidly growing

[6] "In the first place, recent merger activity has been of outstanding importance in several of the traditionally 'small business' industries. More acquisitions and mergers have taken place in textiles and apparel and food and kindred products—predominantly 'small business' fields—than in any other industries." (H.R. Report No. 1191, *supra,* page 3.)

areas; the population of the State of Florida increased by 54.5% between 1950 and 1960.

Respondent objected to the admission in evidence of certain Dairy Credit Books upon which the conclusion as to the decline of fluid milk sellers in the State of Florida is based, primarily on the ground that they are not a precise indication of the companies competing in a particular area. While we agree that these data are not precise, there is no reason to disqualify them as an indicator of the declining trend in this period, particularly when viewed with the other evidence of record. Moreover, common sense argues that this source is more likely to understate than overstate the decline in firm numbers since there are fewer small, obscure processors with each passing year.

Counsel supporting the complaint presented for other areas evidence aimed at showing a decline in the number of firms; this evidence suggests an even greater decline for some of these areas than in Florida. Again, respondent questioned the accuracy of these data, and with some merit. However, if the various data—especially those mentioned above relative to Florida and California—are viewed within the context of the testimony of respondent's own witnesses, the general thrust of the evidence is inescapable. The number of firms selling fluid milk has declined substantially during the last decade and very probably during the last two decades.

The next area of significant disagreement between counsel is with respect to the changing importance of certain large dairy firms. The record indicates that in 1956, the year in which complaint issued against respondent, there were eight large firms with sales exceeding $100,000,000, including sales of nondairy products. These firms, in the order of their size, were National Dairy Products, Borden, Foremost, Carnation, Beatrice Foods, Arden Farms, Pet Milk Co., and Fairmont Foods.

Respondent's witness, economist M. A. Adelman, estimated a universe of total dairy industry sales which was the subject of much controversy between counsel. As discussed below, we agree with the hearing examiner's finding that Mr. Adelman's data contained errors and statistical biases which make them unuseable as precise indicators of the change in the total sales of dairy products. The combined effect of these errors is to overestimate the extent of increase in the universe of total dairy sales over a period of time, and thereby understate the growth rate of large dairies. Despite this defect in Mr. Adelman's universe, it is clear that these eight large firms have grown much more rapidly than have total dairy sales. Whereas Mr. Adelman estimated that between 1935 and 1956 total dairy sales increased by 346%, the total sales of these eight large dairy firms grew by 444%.

Respondent contends that the relevant comparisons of sales growth is not the total sales of these large dairies, but their total sales of dairy products. In this connection, respondent introduced evidence as to the total dairy product sales of four companies—National, Borden, Beatrice and Arden.

According to Mr. Adelman's statistics, between 1950 and 1956, total dairy sales increased by 40.2%. The combined sales of the above four large dairy firms increased by 40.5% and the rest of the industry (including Foremost) by 40.1%. Even if Mr. Adelman's universe estimates were valid, removal of Foremost from the "rest of industry" category and combining it with the large dairy category sheds considerable light on the over-all growth trends of large dairies. On this basis, the five large dairies grew by 61.0% and the rest of the industry (excluding Foremost) grew by 33.5%.[7] Using Mr. Adelman's own universe estimates, the dairy sales of Foremost and the other four dairies in the study grew significantly more rapidly than did the rest of the industry.

The record warrants an additional significant inference. Mr. Adelman's analysis excluded Carnation, which was larger than the two smallest firms included in his study, Arden and Beatrice. The Commission study discussed below reveals that during 1950–55, Carnation's frozen dessert and fluid milk sales grew more than twice as rapidly as did total industry sales of these products. Subtraction of Carnation from the "rest of industry" category would further broaden the rate gap between the largest firms and the rest of the industry.

Although the Adelman study leaves much to be desired as a true indicator of relative growth rates, it does permit the inference that the combined sales of six large dairies, National, Borden, Beatrice, Foremost, Carnation, and Arden, grew significantly more rapidly than did the rest of the industry during 1950 and 1956. Again, it should be emphasized that Mr. Adelman's estimates err in the direction of understating this gap.

Moreover, Mr. Adelman's study showed that between 1935 and 1950 the largest firms were growing significantly more rapidly than his

[7] The above comparisons use 1956 as the terminal year because this was when the complaint issued against Foremost. If 1957 were used, the picture would not be significantly different, however. Between 1950 and 1957 the combined sales of Foremost and the other four concerns in Mr. Adelman's study grew by 67.4% and the rest of the industry by 40.3%. Comparisons between 1950 and 1958 are not possible because Mr. Adelman's study did not include dairy product sales of Arden Farms in 1958.

universe of dairy sales; the combined sales of the eight largest firms (including sales of nondairy products) grew by 240%, whereas Mr. Adelman estimated that total dairy product sales grew by 219%. Since nondairy sales were less important during this period, these data suggest that prior to 1950 the largest firms grew more rapidly than did total industry sales of dairy products.

Counsel in support of the complaint also introduced evidence purporting to show the changing market share of the large dairy concerns during 1950–55. These data make comparisons in physical rather than dollar volumes, thereby avoiding the arbitrary estimates Mr. Adelman was forced to make in determining total sales in dollar volumes. However, the respondent has cited a number of alleged shortcomings which warrant our attention.

First, the universe figures for total fluid milk and ice cream consumption are for the 48 mainland states, whereas Foremost and Beatrice had sales in Hawaii. Similarly, the universe figures did not include sales of recombined milk, whereas Foremost sales include recombined milk sold abroad. These shortcomings do not affect the validity of any comparison except those for Foremost and Beatrice, and apparently, are not very significant with respect to them. In Table 1(a) and Table 1(b) below, this error is corrected by deducting Foremost's ice cream, fluid milk, and recombined milk sales outside the mainland from its total sales. The record does not contain those statistics which are required to determine with precision the degree of error arising in the case of Beatrice. However, since the Hawaiian market is not very large, and Foremost reportedly did about 30% of the total business there, it defies logic to infer that Beatrice's Hawaiian sales were sufficiently large to distort significantly the estimates of Beatrice's share of mainland sales.

The second shortcoming of counsel supporting the complaint's data is that the universe figure of fluid milk does not include sales of raw milk, whereas Borden's sales include raw milk. The record does not permit a measure of the exact magnitude of this error. However, there is no basis for inferring whether this error tends to exhibit an upward or downward bias in Borden's market share during 1950–55.

Thirdly, the figures for Arden are estimated. This hardly seems a valid reason to disqualify them. The Arden official supplying this information explained that it was necessary to make estimates. Moreover, he stated that any margin of error resulting therefrom was small.

Fourthly, respondent argued that the 1954 figure for Foremost is understated because it only includes the postacquisition sales of companies acquired in that year, and that, therefore, the increase shown for the following years is to a considerable measure illusory. This criticism seems valid and, therefore, rules out precise comparison between Foremost's 1954 and 1955 market shares.

Finally, respondent contends that the ice cream universe figures used by counsel supporting the complaint are defective because they are based on preliminary figures which were subsequently revised. Only 1950 universe figures were affected significantly by this error. Because of this, and because 1950 data were not available for Arden, the comparisons reproduced below are restricted to 1951–55.

Tables 1(a) and 1(b) reproduce the relevant portions of counsel supporting the complaint's exhibits showing the market share of ice cream and fluid milk supplied by five dairy firms during 1951–55, and Foremost's share of these products in 1955; the Foremost figure having been adjusted as indicated below.

TABLE 1(a).—*Percent of U.S. production of fluid milk*

	1951	1952	1953	1954	1955
National	6. 68	6. 81	6. 90	6. 74	6. 95
Borden	6. 05	6. 33	6. 35	6. 48	6. 73
Beatrice	1. 68	1. 69	2. 05	2. 36	2. 57
Carnation	1. 25	1. 39	1. 44	1. 45	1. 53
Arden Farms	2. 76	. 78	. 80	. 84	3. 89
Subtotal	16. 42	17. 00	17. 54	17. 87	18. 67
Foremost	--------	--------	--------	--------	3. 41
Total	--------	--------	--------	--------	22. 08

TABLE 1(b).—*Percent of U.S. production of frozen desserts*

	1951	1952	1953	1954	1955
National	14. 02	13. 72	13. 39	12. 50	12. 65
Borden	10. 03	9. 87	9. 61	8. 97	9. 08
Beatrice	3. 73	3. 68	4. 17	4. 37	4. 75
Carnation	1. 81	2. 03	2. 09	2. 13	2. 18
Arden Farms	2. 17	2. 37	2. 48	2. 46	2. 40
Subtotal	31. 76	31. 67	31. 74	30. 43	31. 06
Foremost	--------	--------	--------	--------	5. 56
Total	--------	--------	--------	--------	36. 62

These comparisons reveal that each of these five firms increased its share of fluid milk sales between 1951 and 1955, and that their combined sales amounted to about 18.67% of total sales in 1955. Foremost accounted for an additional 3.41% of these sales in 1955. Although no data are available on Foremost's share of 1951 sales, considering its total sales were only one-seventh as large then as in 1955, its share must have been well under 1% in 1951. Thus, in 1955 six large firms accounted for about 22% of total fluid milk sales, which represented an increase of between four and five percentage points or over 25% in just four years.

In frozen desserts, five large concerns about held their own during 1951–55, although they increased their share slightly between 1954 and 1955 (Table 1(b)). In 1955, they accounted for 31.06% of total frozen dessert sales. In that year, Foremost did 5.56% of the frozen dessert business. Considering that Foremost must have had a very small percentage of total frozen dessert sales in 1951, the combined sales of these concerns increased significantly during this period, due largely to respondent's merger-induced growth.

In interpreting the significance of the above concentration ratios, it is important to keep in mind the large size of the dairy industry. It is an industry with sales of nine billion dollars. A market share change of five percentage points must involve a shift in sales in the order of nearly one-half billion dollars. Moreover, it should be noted that this truly immense sales shift was wrought in just four years.

It is respondent's position that national market share data are without meaning since they do not depict changes that are occurring in the relevant local markets. We do not agree that such data are meaningless as, in our view, the national market share data do provide one index of the industrial transformation occurring in this industry. However, we think that this record demonstrates that concentration in smaller geographic areas is much greater than that existing at the national level. For example, counsel supporting the complaint introduced evidence showing that in the State of California, five large dairies (all of the above except National) accounted for about 40% of total fluid milk sales and 58% of frozen dessert sales in 1955; Foremost accounting for 16% and 18%, respectively. We have considered the objections raised by respondent to these estimates and conclude that they do not overstate actual concentration levels to any significant degree.

The next aspect of the industrial setting which deserves our attention is the degree of concentration existing in the various local markets throughout the country and which as subsequently discussed herein are determined to be the relevant geographic markets within which competition actually occurs.

In Table 2 are reproduced the approximate market shares in 1950 of the largest and four largest dairy concerns in 13 cities as shown by the record. These data indicate that we are dealing with an industry in which sales concentration was extremely high in 1950 in the relevant local markets. Without exception, the largest dairy firm sold 20% or more of the fluid milk and ice cream sold in these cities; and the four largest sold over 60% of the fluid milk and 65% or more of the ice cream.

TABLE 2.—*Market share of the largest and four largest dairy firms in 13 cities, 1950*

Market	Fluid milk			Ice cream		
	Largest firm	4 largest	Foremost	Largest firm	4 largest	Foremost
Gainsesville, Fla	25.0	70.0	25.0	30.0	90.0	30.0
Miami, Fla	20.0	68.0	8.0	24.0	86.0	17.0
Jacksonville, Fla	38.5	60.5	38.5	39.0	93.0	39.0
Daytona Beach, Fla	25.0	70.0	23.0	30.0	*65.0	30.0
Tampa, Fla	35.0	85.0	5.0	25.0	80.0	10.0
San Antonio, Tex	20.0	70.0	15.0	20.0	65.0	20.0
Fort Worth, Tex	20.0	70.0	18.0	20.0	75.0	15.0
Houston, Tex	50.0	95.0	10.0	25.0	70.0	15.0
Spartanburg, S. C	20.0	60.0	29.0	25.0	70.0	20.0
San Mateo, Calif	30.3	77.7	30.3			
San Francisco, Calif	40.1	*74.8	40.1			
Santa Clara, Calif	28.0	74.5	28.0			
Alameda-Contra Costa, Calif	24.2	75.5	24.2			
Average: (unweighted)	28.9	73.1	22.6	26.4	77.0	21.7

*Three companies only.

One final aspect of the industrial setting which deserves our attention is the over-all merger movement occurring in this industry. The courts have repeatedly pointed out that Congress, in creating the Federal Trade Commission, expected it to develop special expertise of the organization of industries which it was directed to regulate. The Commission cannot, therefore, close its eyes to what is common knowledge in this industry. Large concerns have used mergers extensively in their growth, prior to and since 1950 when Section 7 was amended. As already indicated, the amendment resulted, in part, because of Congress' concern with the past history of mergers in the food industry. In three separate studies the Commission has taken special notice of the prominent nature of dairy mergers.[8] Nor can the Commission ignore the fact that since issuance of the complaint herein, complaints have been issued challenging numerous acquisitions by three other large dairy concerns. Thus, this case must be viewed within the context of a merger pattern encompassing a number of large firms in this industry. This record discloses the presence of several of these nation-wide dairies in most of the local markets considered herein and reference will be made to their acquisitions in our subsequent discussion of certain of these markets.

As a result of their numerous mergers these large dairy firms have become vast concerns operating across many markets and, as we have noted, meet one another as competitors in many of the same markets. As already indicated, most of the remaining firms in this industry are relatively small independent dairies operating in one or very few markets. The relatively large size and geographically diversified character of these firms is of considerable potential significance for the character of competition we may expect among these firms. Their geographic diversification adds a significant dimension to their behavioral opportunities.

This brings us to Mr. Adelman's general observations concerning the "hedging" aspects of diversification as providing merely a form of insurance. Obviously the profits of a diversified firm are simply the weighted average of its separate parts, as Mr. Adelman contends. But this tells only how diversification affects a firm's profits in the short run; it ignores completely the "leverage" advantage possessed by large, diversified and geographically dispersed firms such as respondent. A small dairy operating in a single local market has its competitive behavior constrained by conditions existing in this market; a large diversified firm does not operate under similar market constraints. It may, if it chooses, outcompete the little man by subsidizing its operations in one market out of its operations elsewhere. Of course, this temporarily may lower slightly the average profits on its over-all operations. But for the little man, losses in one market mean no profits at all—no profits with which to expand, no profits with which to develop new production techniques, no profits with which to

[8] *Report of the Federal Trade Commission on the Sale and Distribution of Milk*, 75th Congress, 1st Sess., House Document No. 95. This report elaborated the important contribution of mergers to the growth of Borden and National Dairy Products. *Report of the Federal Trade Commission on the Merger Movement*, 1948. This report described in detail the mergers made by Borden and National Dairy Products during the 1940–47 merger movement. *Federal Trade Commission Report on Corporate Mergers and Acquisitions*, May 1955. This report pointed out that Foremost made more acquisitions than any other firm during 1948–54, and that the Borden Co. was the 10th most active acquiring company.

make product improvements; or, simply put, the little man is deprived of the profits which, in a free enterprise economy, makes it possible for him to survive in the long run.

Mr. Adelman's "hedging" analysis does not touch on this advantage of a diversified firm. However, respondent's president, Mr. Turnbow, emphasized it many times during his testimony. Although a diversified firm may exercise restraint in the use of such power, it remains a potent weapon in its competitive arsenal. Its mere possession may be sufficient to deter the small man from acting with competitive vigor and independence.

We now turn to the question of whether respondent's various acquisitions violated amended Section 7. This determination shall be made within the industrial setting and legal considerations discussed above. We shall consider first the question of the relevant lines of commerce which are here involved.

Briefly, the hearing examiner found that the over-all line of commerce is dairy products, defined in the complaint as including "one or any number of the following products: milk, cream, ice cream, cheese, butter, eggs, canned fresh milk, and evaporated milk". Additionally, he held the following to be relevant lines of commerce in this proceeding: the processing and sale of fluid milk (whole milk, skim milk, buttermilk, flavored milk, mixtures of milk and cream, light cream and heavy cream) at wholesale and retail; the manufacture and sale of frozen dairy products, including ice cream, at wholesale; the selling of ice cream at retail; and the manufacture and sale of butter, cheese, eggs, canned fresh milk, and evaporated milk, respectively.

Neither respondent nor counsel in support of the complaint seriously disputes the hearing examiner's ruling. In our view, the hearing examiner correctly applied the tests established by the Supreme Court in the *duPont* case,[9] and we adopt as our own his findings as to the relevant lines of commerce.

We next consider respondent's contention that the hearing examiner erred in his determination as to the proper geographic area of the relevant market. Based principally on the court's holding in the *Bethlehem Steel* case, *supra*, the examiner found that the relevant sections of the country are "those areas of competition in numerous local markets throughout the country where there is an area of effective competition in the products included in the lines of commerce hereinbefore indicated." He specifically named each of these areas in connection

[9] *United States* v. *E. I. duPont deNemours & Co.*, 353 U.S. 586 (1957).

with each acquisition which he found to be illegal. He further concluded that as to ice cream, larger divisions of the United States, or the total United States' market, might be considered a section of the country.

In its brief in answer to the proposed findings of counsel in support of the complaint, respondent is in agreement that the economic and business realities of the dairy products industry establish as effective areas of competition the numerous local markets throughout the country. In this appeal, however, respondent contends that in holding certain areas to be "sections of the country" the hearing examiner was too restrictive. Particular objection is made to such a finding by the hearing examiner with respect to the fluid milk market in the metropolitan areas of Abilene, Texas (population 70,000) and Sioux Falls, South Dakota (population 65,000). Basically, respondent argues that Congress intended to eliminate such limited areas from consideration under Section 7 when it dropped the word "community" in amending that section in 1950.

Section 7, as amended, now requires that competition be adversely affected in a "section of the country". As interpreted by the courts, this determination must be made on the basis of economic reality. Thus, if the nature of the product or the characteristics of an industry are such that an area which may be designated a community is of economic significance, there is no bar to recognizing that area as a section of the country within the intent of Section 7.

The considerations which lead to the conclusion that the numerous local markets constitute the relevant sections of the country, as found by the hearing examiner, are applicable to all such markets, large or small. Included among these considerations, as respondent itself has noted, are the limited area which can be covered by route trucks delivering to customers, differing local health and other regulations, and different price considerations unique to different urban centers. Abilene and Sioux Falls are subject to these same considerations. We find no error in the hearing examiner's ruling on this point.

This leads us to respondent's contention that the hearing examiner erred in failing to take notice of certain revolutionary changes in the dairy industry, particularly the fluid milk industry, which, according to respondent, have taken place since World War II.

In substance, these changes include improved techniques of refrigeration and control of disease producing organisms thus reducing perishability of the product; improved roads; substitution of paper containers for glass bottles thus effecting substantial savings in weight; and significant changes in local health regulations. Coinciding with these changes, according to respondent, are other changes relating to cost of production and distribution which have made it advantageous to process larger volumes of milk. Respondent's argument is that the result of these revolutionary changes has been a large and ever-growing interchange of milk between different markets.

A relevant economic question here is whether recent technological developments have so transformed the economics of this industry that potential entrants face no significant economic barriers in entering the various relevant markets in this case. Respondent argues, in effect, that these barriers are so low that the effects of its mergers inevitably will be diluted by the entrance of new firms.

From our consideration of the record, we agree that technological as well as other changes have taken place which are conducive to large volume production in the fluid milk industry. We find no record support, however, for the conclusion that these changes have been or can be of substantial benefit to all of the many small local companies in that industry. Moreover, we are not convinced from the evidence before us that the so-called "inter-market" distribution of milk will be of such proportions as to significantly alter the competitive pattern in the local markets.

Illustrative of the evidence relied upon by respondent in support of its argument is a table (Respondent Exhibit 160B) purporting to show the distances which 476 milk bottling plants shipped their milk. Of this group, 179 plants did not sell outside their metropolitan areas, and about 60% of the total sold their entire output within 24 miles of their metropolitan areas. Only five plants shipped over 400 miles. The record is silent as to what portion of the 51.9% of the output of these plants which is sold outside their metropolitan areas is actually shipped 400 miles.

This table covers plants located in nine states in the Pacific Northwest and in Hawaii and Alaska. It is admitted by the person responsible for this table that "inter-market" activity is considerably greater in these areas than in the more populated areas of the United States. Regardless, therefore, of the fact that the table is not representative, it does establish that practically all dairy plants in those areas of greatest interchange between markets rely primarily on customers within the metropolitan area in which they are located and the majority rely almost exclusively on customers within 24 miles of their plants. Moreover, the average volume of the 179 plants selling within their metropolitan areas was 2,500,000 pounds yearly, whereas that of the five plants which distributed over 400 miles was 37,300,000 pounds. It is obvious that whatever advantages there may be to "inter-market" distrbution, it belongs to those large companies, be they multiplant or independent, to the consequent disadvantage of the small operator.

Another factor which militates against a finding that there are no significant barriers to entering new markets by "inter-market" distribution is the fact that respondent itself has used mergers extensively to expand into geographic areas near its existing plants. For example, respondent owned a plant in Los Angeles, California, from which it was distributing milk and ice cream in San Diego at a loss. In 1954, it acquired the stock of Hage's Ltd., in San Diego, and began processing and selling milk from that plant. In commenting on this acquisition of a plant within 150 miles of its distribution point, respondent's president stated that the savings in hauling alone made it a profitable operation. Moreover, respondent made numerous mergers to enter and supply many Florida markets rather than enter them through internal expansion simply by supplying them from its Jacksonville plant. In Texas, Foremost also used mergers rather than inter-market distribution to enter many new markets.

To the extent that "inter-market" distribution does exist, additional competitors may appear initially in local markets. However, within an area that can be reached by several companies having the facilities for outside distribution, the result will be that these same companies will begin selling in each of these local markets. These companies must find new business in the competitive market. Although this business may come from customers of both the large and small firms already in the market, we think it obvious that the firms least likely to survive a loss of market shares are the small, nondiversified dairies. It is significant in this respect to project the probable effect on market structure of extensive inter-market distribution of milk. The 476 milk plants covered in the respondent's survey discussed above had total fluid milk product sales of about 3.4 million pounds. Had all these sales been made by plants as large as the five large plants selling milk as far as 400 to 499 miles from their plants, only 91 plants would have been required. This suggests that more extensive inter-market distribution by large concerns would lead to increased concentration of sales. Since Foremost and other large dairies are multiplant firms, the above figure may greatly understate ultimate firm concentration. The tendency to economic concentration inherent in inter-market distribution does not support a finding of increased competition as contended by respondent.

Turning next to the particular acquisitions which are the subject of this proceeding, the hearing examiner classified them into three categories: (1) horizontal, defined as the acquisition of a corporation which was in competition with respondent in the sale of one or more dairy products; (2) conglomerate, defined as the acquisition of a corporation that was engaged in business in which respondent was not engaged; and (3) market extension, defined as the acquisition of a corporation engaged in the dairy business but in a geographical location where respondent was not so engaged prior to the acquisition. With respect to this latter category, the hearing examiner was of the view that such acquisitions must be treated in the same manner as the conglomerates and that the same tests must be applied to determine whether they violate Section 7.

The only corporations which the hearing examiner ordered divested were certain ones which he found competed with respondent to some extent in the sale of dairy products prior to their acquisition and thus fell into the horizontal classification. It is respondent's contention that the hearing examiner erred in ruling that the effect of each of those acquisitions may be substantially to lessen competition or tend to create a monopoly.

The essential facts of record as found by the hearing examiner with respect to five of the corporate acquisitions which he held to be illegal are as follows:

Crescent Creamery Co., Sioux Falls, South Dakota, together with two wholly owned subsidiaries, with assets of about $497,000, was acquired by respondent in August 1953. Respondent was previously in the Sioux Falls area through its acquisition of Dairyland Creamery Company in October 1952. Both of these acquired companies were engaged in the processing and sale of fluid milk and in the manufacture and sale of ice cream. Dairyland Creamery was a small operation with milk sales in 1951 of about $225,000 and ice cream sales of about $340,000. Its plant is described by a former representative of Foremost as being "much, much too small even for our own operations" and, after the Crescent acquisition, respondent combined both operations in the larger Crescent plant.

As a result of the Crescent acquisition, respondent's milk sales in the Sioux Falls area totaled over one million gallons in 1953, the year of acquisition. The Sioux Falls-Mitchell Federal Milk Market Order discloses that these sales constituted 40.2% of that market in that year. As Foremost was not selling in Mitchell at this time, it is obvious that its share of the Sioux Falls area alone was even greater than 40.2%. It is clear from the limited nature of the Dairyland operation and its small volume of milk sales in 1951 that the great bulk of this market share was obtained as a result of the Crescent acquisition.

It appears that the four principal competitors of respondent in Sioux Falls at the time of the Crescent acquisition were single-plant independents, lacking the advantages of geographic diversification. Moreover, it appears that because of the large, established chain store distribution of milk by respondent and two independents, a later attempt by a dairy concern to enter this market met with failure.

Also in 1953, respondent, in the same transaction, acquired Moanalua Dairy, Ltd., and Rico Ice Cream Company, Ltd., from Hawaii Dairy Industries, Ltd. Both companies were engaged in business in Honolulu, Hawaii, the former processing and selling fluid milk and the latter manufacturing and selling ice cream. In 1952, respondent had entered the Honolulu market in the fluid milk business through its acquisition of Campos Dairy Products, Ltd., which in 1951 had 7.23% of the fluid milk sales on the Island of Oahu of which Honolulu is the principal city. The percentage of this market held by Moanalua in 1953 is not given in the record. However, it appears that its average daily production of fluid milk was slightly higher than that of Campos and even assuming a somewhat higher total consumption for the Island, Moanalua's share would be about 7%. As it appears that its sales were primarily in the Honolulu area, rather than throughout the entire Island, it is obvious that its share of the Honolulu market was even larger. In any event, respondent's treasurer testified that the combination of Campos and Moanalua in 1953 gave Foremost 30% of the fluid milk business on the Island of Oahu. Thus, it is clear that respondent increased its production prior to the acquisition of Moanalua and that this merger added significantly to its market share and eliminated a substantial competitor. Moreover, the importance of this acquisition is emphasized by the fact that at that time, respondent's competition in the sale of fluid milk on Oahu consisted of Beatrice Foods and only four or five small dairies. As Rico had only two ice cream competitors on the Island, the market was highly concentrated in the over-all line of commerce of dairy products.

The fact that respondent subsequently combined its fluid milk and ice cream operations in a single plant indicates the close economic kinship between ice cream and fluid milk manufacturing and distribution. This kinship was well expressed by respondent's president when, in testifying with respect to the acquisition of a milk company in California in an area in which respondent had not previously sold milk but did have a small ice cream business, he stated:

> Our competitor had both milk and ice cream and in order to protect our business, strictly competitive of the keenest type, we acquired the milk business to protect our ice cream business.

Accordingly, we find no error in the hearing examiner's ruling that respondent's acquisition of Rico Ice Cream Company was complementary to the Moanalua fluid milk business and cannot be considered apart from it.

In his findings as to the market conditions involved in the Moanalua and Rico acquisitions, the hearing examiner concluded that these acquisitions had a tendency to lessen competition and to create a monopoly in fluid milk and ice cream in the Honolulu market and throughout the Island of Oahu. However, in a later discussion as to the probable adverse effects of these mergers, he limited the relevant market to the Honolulu metropolitan area. The record supports a finding that the concentration of population on Oahu was in the Honolulu area. However, considering the market factors discussed above, it is our view that the relevant market for consideration of the effects of the Moanalua and Rico acquisitions is the Island of Oahu, including the Honolulu metropolitan area.

In 1952, in one transaction, respondent acquired two corporations, both of which were engaged in the processing and sale of fluid milk and in the manufacture and sale of ice cream. The larger of these companies, Southern Maid, Inc., of Bristol, Virginia, had total sales of about $4,417,000.00 and total assets of about $1,246,000.00 the year before acquisition. The sales of the second company, The Welch Milk Company, Welch, West Virginia, were about $1,693,000.00 and it had total assets of about $535,000.00. These companies had the same officers and stockholders and conducted their business as a common operation. Prior to 1952, respondent was in competition with this combined business operation in the sale of both fluid milk and ice cream in two areas, Johnson City and Kingsport, Tennessee.

The evidence with respect to these acquisitions discloses that in 1951, Southern Maid, Inc., had fluid milk sales of about $1,700,000.00 and ice cream sales of about $865,300.00 in the areas of Kingsport and Johnson City, Tennessee, and Bristol and Appalachia, Virginia. Respondent's sales of fluid milk at that time in the first two of these areas were about $863,000.00, and its ice cream sales were about $450,000.00. The combination of Southern Maid and Foremost gave Foremost, in 1956, a fluid milk market share in excess of 26% in the four-market area previously served by Southern Maid.

It is to be noted that specific market shares of Southern Maid and respondent at the time of the acquisition are not revealed by this record. However, respondent, in its appeal brief, by comparing its dollar sales volume of $863,000.00 with the total gallonage which this figure represents, 989,791 gallons, conservatively estimates a price of $1.00 per gallon for milk in this area in 1951. Using respondent's estimate, it will be seen that Southern Maid's total sales of about $1,700,000 represented a like number of gallons and that this amount combined with respondent's sales of 989,791 gallons makes a total of over 2,600,000 gallons sold by the two companies in 1951. The 26% market share held by respondent in 1956 represented sales of 2,007,018 gallons. Even assuming the total sale of fluid milk in the four areas remained the same from 1951 to 1956, although respondent probably correctly assumes that it has grown larger, it is clear that the two companies held somewhat more than 26% of the market in 1951. Since Southern Maid's sales were slightly more than double those of respondent at that time, it can be concluded that Southern Maid held about 18% of the four-market area and that respondent with about 9% at least tripled its share by this acquisition.

The evidence also discloses that in the area composed of Welch and Bluefield, West Virginia, and Richlands, Virginia, which had been supplied by Southern Maid or The Welch Milk Company prior to acquisition, respondent had over 32% of the fluid milk market in 1957. As previously stated, respondent did not sell in these areas prior to the acquisitions. The record is silent as to the specific share of this market obtained by respondent as a result of the acquisitions.

The hearing examiner limited the relevant market area to the section of the country comprising the tri-city market area of Kingsport, Johnson City and Bristol. It is our view that to determine the full effects of the acquisition of this combined operation, the relevant market area should also include the Appalachia area.

As a result of each of the aforementioned acquisitions, respondent eliminated a substantial competitor and achieved a very sizeable percentage of total sales in the relevant markets, therby contributing substantially to its position in these markets. These facts make it clear that competition would have benefited had these concerns remained independent. Moreover, it is highly important that the consequence of these acquisitions be viewed in the light of the industrial setting in which they took place.

As set forth above, most local fluid milk markets are extremely concentrated, the total number of fluid milk distributors is declining, and the technological and market barriers confronting prospective entrants are rising. The above horizontal acquisitions by respondent have further contributed to such concentration. Even where local market concentration may have declined for some reason after the acquisition, the over-all industrial setting here is such that we believe that respondent's mergers seriously retarded this decline, and that consequently competition would have benefited had these acquisitions not occurred. As we have noted, this particular industry is characterized by many small firms which lack the power resulting from diversification as well as other advantages accruing to large multiplant concerns such as respondent. We think the following statement by the court in the *Crown Zellerbach* case, *supra*, is especially relevant to these acquisitions:

To borrow a phrase from Universal Camera, Congress expressed a mood that acquisition of a rival firm by a larger one, resulting in a substantial increase in the concentration of power in the absorbing concern, is to be prohibited for the reason that such increased opportunity for domination will probably lessen competition or tend to create a monopoly. It is its tendency to concentration of power that condemns the merger.

This alone justified the Commission's finding that the reasonably probable result of the acquisition would be substantially to lessen competition and to create a monopoly.

It is our opinion that the aforementioned acquisitions are the type contemplated by the Congressional mood referred to by the court. We conclude, therefore, that the hearing examiner's ruling that respondent's acquisitions of Crescent Creamery Co.; Moanalua Dairy, Ltd.; Rico Ice Cream Company, Ltd.; Southern Maid, Inc.; and The Welch Milk Company violated Section 7 is fully supported on the record.

Three other companies which the hearing examiner ordered divested are located in the State of Texas. They are Banner Dairies, Inc., Abilene, Texas; Tennessee Dairies, Inc., Dallas, Texas; and Phenix Dairy, Houston, Texas.

We first consider respondent's argument that, contrary to the hearing examiner's ruling, these companies were not engaged in interstate commerce for the purpose of applying Section 7. That section, as pointed out by respondent, applies only to an acquisition in which both the acquired and the acquiring companies are engaged in commerce.

It is clear from the record that each of the three companies was regularly engaged in the purchase of certain dairy products, namely, milk, cheese and butter, from suppliers located outside of the State of Texas and that these products were shipped directly from the suppliers to the plants of Banner, Phenix and Tennessee Dairies. The products underwent certain changes in the plants of these companies, such as processing or repackaging, and then were sold only within the State of Texas by each company.

The hearing examiner found that the entire transaction, from the purchase out-of-state to the final sale within the state, constituted a transaction in interstate commerce, notwithstanding the changes which took place in the form of the product. In substance, respondent contends that the commerce requirement of Section 7 can only be met by a showing that these firms were engaged in the sale of dairy products outside of Texas.

We do not find it necessary to rely on the flow of the products to the ultimate consumer in Texas, as the hearing examiner apparently did, to establish the requisite element of commerce as to these three concerns. Section 7 requires that the parties be "engaged in commerce" and "commerce" is defined in the Act in part as meaning trade or commerce among the several states. It is well settled that the term comprehends intercourse for the purpose of trade in any form, including both the purchase and sale of commodities.[10] The Supreme Court has cited with approval the language of the court in *Butler Bros. Shoe Co.* v. *United States Rubber Co.*, 156 Fed. 1 (8th Cir. 1907), that "... all interstate commerce is not sale of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; . . ."[11] We hold that Banner, Phenix and Tennessee Dairies were engaged in commerce for the purposes of Section 7 through their purchases of dairy products from outside the State of Texas.

Looking, therefore, at the facts of each of these acquisitions, we find first that Banner Dairies, when it was acquired by respondent in 1953, had milk processing plants located at Abilene, Brownwood, Midland and San Angelo, Texas; an ice cream manufacturing plant at Abilene; combination milk and ice cream distribution branches at Odessa, Big Spring and Eastland, Texas; and milk distribution points at Haskell, Hamlin and Coleman, Texas. Its fluid milk sales the year before acquisition were about $2,790,400 and its ice cream sales were about $642,700.

Respondent was in competition with Banner Dairies in the sale of ice cream in the Abilene market prior to the acquisition. In 1952, Banner's ice cream sales in this market were about $373,000 compared to Foremost's sales of about $380,000. The record does not contain statistics as to the total ice cream sales in the Abilene area in that year. However, the record does show that in the nearby Fort Worth area with a population of about 280,000 in 1950, respondent's ice cream sales in that year of about $695,000 constituted 15% of the market. Likewise, its ice cream sales of $501,400 in the Dallas area, with a population of 494,000 in 1950, constituted 10% of the sales in that area.

[10] *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).
[11] *International Textbook Co.* v. *Pigg*, 217 U.S. 91 (1910).

Thus, even considering the fact that the average per capita consumption of ice cream increased from 17.2 pounds in 1950 to 17.9 pounds in 1952, it may be inferred that the combination of sales of ice cream by Banner and Foremost in 1952 totaling about $750,000, constituted well over half of the market in this relevant product line in Abilene with its population of about 60,000.

In addition to doubling its ice cream sales in Abilene by acquiring Banner Dairies, respondent supplemented this product line with a fluid milk line with sales of over one million dollars in the Abilene market in the preceding year. Moreover, it obtained substantial chain store distribution of fluid milk in Abilene, which is of vital importance to the existence of a wholesale milk business. Also, respondent was able to offer not only a single dairy product, ice cream, to its Abilene customers, but with its product diversification, could supply a full line of these related products to the competitive disadvantage of firms with restricted lines. Respondent's profits in the Abilene area increased from $163,000 in 1954 to $270,000 in 1955.

It appears that at the time of the acquisition as well as at the time of the hearing, only one of respondent's competitors in Abilene operated a fluid milk processing plant in that area. All other competitors in this market ship their milk from distances ranging from 95 to 295 miles. It is significant to note that the only other local dairy company having a processing plant in Abilene was acquired by The Borden Company, one of the nation-wide, multiplant dairy companies, the same year that Foremost acquired Banner Dairies.

The acquisition of Tennessee Dairies, Inc., took place in 1952. Prior thereto, that company processed and sold fluid milk in Dallas, Longview, Kilgore, McKinney, Sherman, Waco, San Antonio, Terrell and Sulphur Springs, Texas. Also, it sold milk at its Dallas plant to customers who distributed in Odessa, Corpus Christi and other towns in the Rio Grande Valley.

In the Dallas area, Tennessee had fluid milk sales in the amount of about $4,332,000 in 1951. Respondent had 10% of the ice cream business in that area prior to the acquisition but did not compete with Tennessee in the sale of any dairy product in the Dallas market. However, we agree with the hearing examiner that as in the Banner acquisition, the ice cream business was complementary to the sale of fluid milk and this acquisition thus gave respondent a competitive advantage because of its product diversification.

It is estimated by respondent's Southwest Division manager that Tennessee Dairies ranked fourth or fifth in the Dallas area in the sale of fluid milk at the time of this acquisition. It had substantial, well-established chain store distribution which was inherited by Foremost, and for the period of 1956 through 1959 Foremost had over 15% of the fluid milk market in Dallas and the surrounding area. Respondent's fluid milk sales have steadily increased in this market and, in 1957, it is estimated that it ranked third in fluid milk sales.

Although respondent did not sell fluid milk in the Dallas market prior to the Tennessee Dairies acquisition, it did have an established plant in nearby Fort Worth. Its fluid milk sales in that area were substantial, totaling about $2,526,000 in 1950. This constituted 18% of that market. Of particular significance here is the fact that the national, multiplant Beatrice Company acquired a substantial dairy concern in Fort Worth in 1959 and almost immediately began selling in the Dallas market. The Borden Company had been in the Dallas area for some time. It appears likely that Foremost, had it not been able to acquire a Dallas dairy, would likewise have begun competing in that area from Fort Worth, a distance of only about 35 miles, and that Dallas consumers would thus have had the benefit of competition between respondent and Tennessee Dairies.

The total volume of milk sold by respondent's Dallas and Fort Worth plants increased from 10,472,600 gallons in 1956 to 10,830,400 gallons in 1959.

Tennessee Dairies and Foremost did compete in the sale of fluid milk in San Antonio prior to this acquisition. In 1950, Borden and one other dairy, an independent, each had 20% of this market. Two other independents and Foremost each had 15%. Thus, these five companies controlled 85% of the fluid milk market.

In addition, Borden and Foremost, together with Swift, had 60% of the ice cream market, equally divided among the three. Tennessee came into the San Antonio Market in 1951 and, in that year, it obtained a share of 1.2% of the market. This share, though small, added to respondent's already significant position in the fluid milk market and, as complemented by respondent's substantial ice cream sales, is sufficient in our view, to warrant a conclusion of probable adverse competitive effect in the San Antonio area.

As was true of the other Texas markets we have discussed, Foremost was followed into the San Antonio market by another national, multiplant company, Carnation, which had not previously sold fluid milk in that area. Carnation acquired one of the two independent companies which, in 1950, had 15% of this market.

The third Texas acquisition ordered divested by the hearing examiner was that of Phenix Dairy. This company, which was acquired by respondent in 1952, processed fluid milk in Houston which it distributed in Houston and two other towns within 60 miles of that city, and manufactured ice cream in El Campo, Texas, which it also distributed in Houston. Its fluid milk sales in the Houston area in 1951 amounted to approximately $5,455,000 and its ice cream sales in that area were about $34,100. Respondent's sales of fluid milk in the Houston area at that time were $1,492,200 and its ice cream sales were $798,900.

Although the bulk of Phenix' sales of fluid milk were at retail home delivery, it also was a substantial competitor in chain store distribution. There is some dispute as to the percentages of the fluid milk market held by Phenix and respondent prior to the acquisition. It appears on the basis of respondent's estimate that in 1950, Phenix had 15% of this market in the Houston area and that respondent had 10% of the market as well as 15% of the ice cream market. Apparently, as found by the hearing examiner the combined share of the two companies in 1952 was between 17% and 25%. In any event, Phenix was one of the largest independent dairies in the State prior to its acquisition and, as a result thereof, respondent became the second largest distributor of fluid milk in the Houston area.

In the Houston market two years before this acquisition, Borden had 50.0% of the fluid milk sales and Carnation had 20.0%.

We agree with the hearing examiner that respondent's acquisitions of these three Texas companies made it a major factor in chain store distribution in certain areas and that in each of the four markets discussed above respondent obtained a competitive advantage over local concerns. Moreover, the hearing examiner was correct in finding that these three Texas acquisitions contributed to respondent's geographical diversification with the attending advantages which we have previously discussed. In addition, however, in determining the probable effect on competition, it is essential to view these three acquisitions within respondent's previous over-all growth pattern in the Texas area. As heretofore pointed out, Congress in amending Section 7 was well aware of the cumulative effect of a series of acquisitions and the need for intervention in such a process.

About seven years prior to these three Texas acquisitions, respondent acquired Southwest Dairy Products Company with sales of about $3,000,000. Southwest had combination milk and ice cream plants in San Antonio, Texas, and Shreveport, Louisiana; a milk plant in Fort Worth, Texas; an ice cream plant in Houston, Texas; a milk receiving station at Cleburne, Texas, and ice cream distribution points at Beaumont and Huntsville, Texas. Respondent had not operated in any of these areas previously.

The following year, 1946, respondent made its first entry into the Abilene market by acquiring the Abilene and Fort Worth ice cream business of the Pangburn Ice Cream Co. The next two years respondent added to its Houston operation by the acquisition of the fluid milk plant of the Metzger Dairy Company in 1947 and, in 1948, by the acquisition of F & M Dairies, Inc.

Thereafter, respondent made the following acquisitions in Texas: in 1949, the ice cream business of Tasty Ice Cream Company in Sherman and Bonham and in the same year, the milk routes of a producer-distributor in Houston; in 1950, the Colonial Ice Cream Company in Beaumont; in 1951, the fluid milk business of Mrs. Tucker's Foods in Sherman; and in 1952, Taylor's Home Made Ice Cream Company in Fort Worth which did about 15% of the ice cream business in that area in 1950.

The preceding resume illustrates that respondent used mergers extensively in its entry and expansion into the Texas area. Prior to acquiring Phenix Dairy, respondent had already penetrated three of the largest cities in Texas—Fort Worth, Houston and San Antonio—as well as some medium-sized cities such as Beaumont and Abilene, and many smaller communities. It also had made two acquisitions in Shreveport, Louisiana, just across Texas' eastern border.

In addition to the above acquisitions by Foremost, it is important to note that in each of the four relevant geographical markets except Houston where Borden and Carnation already controlled 70% of the fluid milk market in 1950, one of the large, diversified dairy firms replaced a local independent firm a short time after respondent made its acquisitions. Thus, Foremost followed Borden and Carnation into the already concentrated Houston market. Beatrice, Borden and Carnation followed Foremost into the Dallas, Abilene and San Antonio markets, respectively. This is a clear example of the elimination by merger of local dairies and their replacement by companies with the power accompanying diversification, to the consequent disadvantage of the remaining local competitors.

This growth pattern of Foremost and the merger pattern of the other large dairies in these markets gives added significance to respondent's acquisition of Phenix, Tennessee, and Banner. Not only were each of these acquisitions horizontal in certain relevant markets, but they involved the elimination of substantial potential competition among the acquired concerns and respondent. Foremost's pre-merger growth history in Texas demonstrates it was capable of and interested in expanding into more and more Texas markets. The last three firms it acquired represented sizeable independent concerns. By acquiring them, respondent eliminated firms which otherwise would have been among its leading rivals. The acquisition of Tennessee Dairies is illustrative on this point. Tennessee had total sales of $10,706,800 in 1951, which was about one-fifth as great as respondent's total sales in that year. San Antonio was the only relevant market in which both Tennessee and respondent operated in 1952. Respondent did 15% of the fluid milk business and Tennessee did 1.2%. However, the fact that Tennessee had entered this market only about one year earlier explains its relatively low market share. By acquiring Tennessee, respondent eliminated what very probably would have been one of its strongest future rivals in this area. As further elaborated below in our discussion of Philadelphia Dairy Products, Inc., Foremost had the ability and incentive to grow through internal growth in new areas but preferred to grow by mergers. Here we have a situation frequently found in antitrust matters; what seems sound and prudent for an individual company is contrary to the public policy of maintaining competition.

We think the following language of the court in the *Brown Shoe* case, *supra*, is particularly applicable to respondent's growth in the Texas markets:

> We can only eat an apple a bite at a time. The end result of consumption is the same whether it be done by quarters, halves, three-quarters, or the whole, and it is finally determined by our own appetites. A nibbler can soon consume the whole with a bite here and a bite there. So, whether we nibble delicately, or gobble ravenously, the end result is, or can be, the same.

We concur with the hearing examiner's decision that respondent's acquisitions of Banner Dairies, Inc., Tennessee Dairies, Inc., and Phenix Dairy may have the effect of substantially lessening competition in the markets in which respondent and the acquired dairies operated prior to their acquisition.

The final acquisition ordered divested by the hearing examiner was that of Golden State Company, Ltd., San Francisco, California. At the time the agreement of merger was ratified in February 1954, Golden State processed and distributed fluid milk at wholesale and home delivery retail. It also distributed a full line of dairy and related products, operating substantially throughout the entire State of California. It had the largest over-all dairy business in that State in terms of dollar sales. Its growth had been aided considerably by mergers, Golden State having acquired thirteen milk and ice cream companies in the eight-year period prior to its acquisition by Foremost.

Foremost, as the result of its previous acquisitions in California, was competing with Golden State at the time of its acquisition in four market areas: Alameda-Contra Costa, San Francisco, San Mateo and Santa Clara. As found by the hearing examiner, Golden State's volume of fluid milk sales in these four areas in 1953 amounted to about 15,800,000 gallons, which constituted about 30% of its total fluid milk sales in the State. Foremost's sales of fluid milk in the same four areas in 1953 were about 8,000,000 gallons. By acquiring Golden State, respondent increased its share of the fluid milk market in each of these areas as follows: San Francisco—from 22.3% to 37.7%; Santa Clara—from 7.0% to 29%; Alameda-Contra Costa—from 3.9% to 26%; San Mateo—from 6.7% to 26.8%. Respondent became the largest distributor of fluid milk in the State of California.

The hearing examiner's detailed findings as to the market conditions existing in each of the four relevant geographic areas are fully supported by the record. These findings led the hearing examiner to conclude that the effect of the Golden State acquisition may be substantially to lessen competition in the sale of fluid milk in each of these four areas. He also concluded that the acquisition resulted in a definite tendency to the creation of an oligopoly in the fluid milk and frozen dessert industries in the entire State of California.

We fully agree with the hearing examiner's conclusions. The acquisition of Golden State removed from the competitive scene the largest dairy business in California and one of the largest in the country. Moreover, the potential impact of this acquisition on competition goes beyond the implications of the horizontal aspects which are clearly shown by the hearing examiner. As with the three Texas acquisition's, the Golden State merger must be viewed within respondent's over-all merger and growth pattern in California and the position of the other large multiplant dairies which respondent, through mergers, followed into the four relevant areas. In this latter connection, the record discloses the following with respect to the presence of such dairies and their fluid milk market shares in 1953:

San Francisco	
Borden	23.9%
Arden	5.4%

Santa Clara	
Borden	20.6%
Carnation	11.7%
Arden	3.4%
Beatrice	10.0%

Alameda-Contra Costa	
Borden	12.2%
Carnation	14.9%

San Mateo	
Borden	21.5%
Carnation	4.2%
Arden	7.2%

The concentration existing in these four areas in 1954 is evidenced by the sales of fluid milk of these large concerns (in terms of percentages) as follows: San Francisco: Borden, Arden and Foremost, 63.7%; Alameda-Contra Costa: Borden, Carnation and Foremost, 51.8%; Santa Clara: Borden, Carnation, Arden, Beatrice and Foremost, 73.4%; San Mateo: Borden, Carnation, Arden and Foremost, 56.6%. Following the pattern evidenced in the Texas markets, Beatrice entered the San Mateo market in 1955 and Carnation entered the San Francisco market in 1958.

Respondent's growth pattern in California prior to its acquisition of Golden State is also disclosed by the record.

Respondent made its first entry into the California market when it acquired on February 11, 1952, International Dairy Supply Company, a Nevada corporation, Oakland, California. In the same transaction, respondent also acquired the capital stock of International Dairy Engineering Company, a California corporation, and Diamond Dairy, Inc., a Nevada corporation. The total consideration for these three concerns was $3,000,000 in cash and 142,375 shares of Foremost common stock. International Dairy Supply was engaged in the production and sale of recombined milk, cream, buttermilk, ice cream, and cottage cheese. For the year ended January 31, 1951, International Dairy Supply had sales of approximately $6,325,000 and net income of about $912,000.

International Dairy Engineering Company purchased in the above transaction, was organized to do engineering research and to build plants and supply recombined milk and other dairy products for the Far East operation carried out by International Dairy Supply Company.

Diamond Dairy, also purchased in the above transaction, was engaged in the processing and distribution of fluid milk at wholesale and at home-delivery retail in the Oakland, California, area. For the year ended March 31, 1951, Diamond Dairy had net sales of approximately $737,000. Diamond had 2.4% of the fluid milk sales in the Alameda-Contra Costa marketing area.

On December 5, 1952, respondent acquired R. A. Shuey Creamery, Oakland, California, which in 1952 had sales of about $1,084,000 in the Oakland area. Then, on May 1, 1953, Foremost acquired Marin Dairymen's Milk Co., Ltd., San Francisco, which in 1952 had sales of about $9,500,000. Also acquired was Marin's wholly owned subsidiary, Dairymaid Creameries, Ltd., which had sales of about $8,000,000.

In February 1954 came the Golden State acquisition. After that merger, respondent, on May 31, 1954, acquired Redwood Empire Dairies, Inc., which sold milk in Fortuna and Humboldt counties. This was followed with the acquisition, on August 19, 1954, of Hage's, Ltd., San Diego, California, with sales of about $4,676,000.

This series of acquisitions in California indicates a common plan of expansion. Having previously blanketed most of the South, the Atlantic States, and the midcontinent, respondent decided to move into California. Respondent clearly had the resources to enter this market and, indeed, had taken substantial steps in this direction prior to acquiring Golden State. By acquiring Golden State, it not only removed an actual competitor in several significant markets, but also eliminated its greatest single potential competitor in other parts of the State. Respondent's past growth record elsewhere indicates that it was just a matter of time until it would have moved into other parts of the State. Its growth pattern after acquiring Golden State indicated that it intended to do so. Thus, respondent eliminated precisely that firm which had the financial and other resources to offer it the greatest potential, as well as immediate, competition. The probable effect of respondent's acquisition of Golden State must be determined within this industrial environment. We have done so and have concluded that this is one of the types of mergers which Congress intended to prevent when it was considering amended Section 7. We find no error in the hearing examiner's ruling as to this acquisition.

In addition to its argument concerning the changing character of the dairy industry heretofore discussed in this opinion, respondent's principal contention with respect to its Golden State acquisition is that the hearing examiner failed to properly consider postacquisitional market data, which it placed in evidence, in determining the probable effect on competition of this merger. This same argument is used by respondent in challenging the hearing examiner's finding of the likelihood of adverse competitive effects resulting from each of the other acquisitions ordered divested. Respondent's argument on this point will be treated separately hereinafter since substantially the same considerations are involved in this issue insofar as it relates to each such acquisition.

One other issue has been raised by respondent with reference to its Golden State acquisition. It is conceded by respondent that Golden State was engaged in commerce. However, respondent contends that the hearing examiner was in error in ruling that this acquisition was illegal since there is no showing that Golden State was engaged in commerce in the fluid milk line in which it competed with Foremost prior to the acquisition. Specifically, respondent argues that under Section 7, the adverse competitive impact must be felt in a line of interstate commerce in which the acquired company is engaged.

Respondent's argument is based on its interpretation of the statute. It points out that Section 1 of the Clayton Act provides that "commerce", as used therein, "means trade or commerce among the several States", that is interstate commerce. It follows, therefore, according to respondent, that the competitive injury must occur in "any line of (interstate) commerce".

We do not agree with respondent's construction of this language which was added by the 1950 amendment of Section 7. It is our view that "line of commerce" denotes a product market. It has thus been defined by the court in the *Brown Shoe* case, *supra*, and in other cases therein cited. Moreover, considering the fact that the courts have held that a single state or a lesser area within a state may comprise an effective area of competition, we think it necessarily follows that the adverse competitive effects directly resulting from an acquisition can be measured upon intrastate competition. We do not think Congress, in expressly broadening the provisions of Section 7 by the 1950 amendment, intended to limit its application in the manner proposed by respondent. Section 7 does require that both the acquired and acquiring corporations be engaged in commerce and this is conceded as to both Golden State and Foremost. Having met this requirement, adverse competitive effects resulting from the activities of such interstate companies whether such effects be local or interstate, are within the scope of Section 7.[12]

Even under respondent's interpretation of "line of commerce" as meaning a line of interstate commerce, the facts herein establish that the probability of a substantial lessening of competition as a result of the Golden State acquisition does occur in the fluid milk line of interstate commerce of the acquiring company, Foremost. Respondent's proposed extension of its interpretation to mean that the adverse effect must appear in an interstate line of commerce of the acquired company is without merit, In so-called "vertical" acquisitions, the courts have made it clear that the injury may be shown in the relevant line of commerce of either the acquired or acquiring firms. The same statutory language applies to horizontal as well as vertical mergers.

As hereinbefore stated, respondent relies to a great extent on post-acquisitional market data in support of its argument that the evidence fails to sustain a finding of probable adverse competitive effects in

[12] Cf. *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

each of the acquisitions ordered divested. Specifically, respondent contends that such a finding cannot be supported in view of evidence tending to show that subsequent to the acquisitions, in each of the individual markets, respondent's market share declined; the market share of competitors, including small processors, increased; and the number of competitors increased.

Much of the market data upon which respondent relies are based on Federal Milk Market Order Statistics published by the United States Department of Agriculture. We have serious doubts that these data support respondent's position. That it cannot be relied upon to the extent indicated by respondent is obvious from the following introductory statements in the publication:

> Because the volume of milk regulated in a given market is affected by changes in the definitions of handler, marketing area, and producer and because handlers sometimes become regulated or unregulated as the result of a minor shift in operations, the data herein compiled are not adaptable to studies of marketing trends and unless the student is thoroughly familiar with the developments which have taken place in each market.
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> * * * * * * *
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> In arranging this information for convenient reference it has been necessary to sacrifice much of the detail which is important in evaluating individual market situations.

The market data relied upon by respondent are of little weight for other reasons. The evidence shows that it is commonplace for the market share of merging companies to decline for a time after the merger for reasons not related to the ultimate effect of the merger. One such reason as reflected in this record is that if an acquiring company discontinues the brand of the acquired company, it may lose those customers having strong loyalty to the discontinued brand. Respondent's president testified as to this normal decline after an acquisition. Respondent's board chairman also testified to this fact but stated that he believed that such postacquisitional declines would last for only six months or less. While the timing and magnitude of such declines may be debatable, it is obvious that such declines do occur for reasons which have little relationship to the long-run effect of mergers on the state of competition.

Respondent cites evidence relating to its acquisition of Phenix Dairy in Houston as illustrating a "sharp decline in Foremost's market position in a six-year period following the acquisition". Yet the facts clearly illustrate that although there was an initial decline in respondent's market share after the acquisition, by 1958 respondent's market position in fluid milk in the Houston area was slightly higher than it was in 1954, the year following its first full year of combined operations. In this example, we have six years of postacquisitional history as to market shares, yet the evidence is still inconclusive. Such data, insofar as their relationship to probable effects is concerned, are unstable and equivocal, and consequently their significance is inconclusive.

Respondent's argument ignores the fact that as a result of those acquisitions herein found to be illegal, substantial competitors, actual and potential, have been eliminated. As we have previously pointed out, the dairy processing industry is undergoing technological changes which seem to be favoring the large firms. In such an environment, it is especially important that substantial competitive factors not be eliminated from the competitive race. In this connection, however, respondent repeatedly argues that in recent years there has been an increase in the number of dairies selling in certain cities, and that this is evidence of increasingly competitive market conditions. What this argument does not take cognizance of is that the number of dairy firms has been declining. Even in California, which is one of the largest and fastest growing States, the number of fluid milk plants declined by 70 between 1952 and 1957. It may be true that in their struggle to survive and grow, some independents, as well as the large multiplant dairies, have entered new markets, including some in which respondent made acquisitions. However, in an industry experiencing a substantial decline in the total number of firms, including the elimination, through mergers, of substantial independents, it seems highly probable to us that the number of potential, as well as actual, competitiors is declining. The court, in the *Crown Zellerbach* case, *supra*, set forth in a footnote a quotation from Bok, "Section 7 of the Clayton Act and the Merging of Law and Economics", 74 Harv. L. Rev. 226, which we consider to be significant on this point.

> The loss of a substantial firm, however, may of itself induce a reduction in the vigor of competition. For even if new entrants are coming into the market or concentration is for some other reason declining, there will be one less substantial firm that would have existed but for the merger, and an adverse finding under § 7 is predicated on the presumption that competition would have been benefited had that firm remained independent.

That there are other factors in addition to market share data which should be considered in determining the probable effect of any merger is well illustrated by the following quotation from respondent's 1953 Annual Report commenting on its Golden State acquisition:

> However, it is the implications of our dramatic growth in resources and scale of operations, rather than the mere figures themselves, which reveal fully

the merger's true significance in relation to our company's future. Besides adding substantially to overall volume, our new position in California contributes importantly to our company's geographical diversification, thus protecting it more fully from any local business declines. The addition of Golden State brings our company's sales to a level where they can support advertising and promotion on a national scale to an ever-growing degree. The greater financial strength and combined research facilities resulting from the merger will permit an even greater development of new products, and of over-all product diversification within the dairy field. All of these advantages should contribute significantly to future sales and earnings.

In the face of respondent's above statements concerning the post-acquisition benefits flowing from its California merger program, respondent's argument as to the significance of post-acquisition data lacks conviction and must be rejected.

We come now to the issues raised by the appeal of counsel supporting the complaint. First, they contend that the hearing examiner erred in failing to find that each of respondent's acquisitions of a corporation shown to have been engaged in commerce, considered individually, violated Section 7. In support of their argument, they set forth certain principles as applicable to each type of acquisition, horizontal, conglomerate and market extension, and argue that these principles provide appropriate bases for the conclusion of unlawful effect in each acquisition. However, we have given careful consideration to the relevant facts of record as they apply to each separate acquisition and with one exception, to be discussed later, we are of the opinion that the evidence fails to support a finding that the various acquisitions, other than those previously discussed, considered individually, are likely to have the required adverse competitive effects.

Counsel also argue that the facts with respect to individual violations "constitute a part of the factual basis for the violations of law arising out of the over-all acquisitional pattern [of respondent] considered cumulatively." In substance, they contend that the effect of the cumulation of competitive power and advantage accruing to respondent from all of its acquisitions of corporations engaged in commerce alleged in the complaint, as amended, may be substantially to lessen competition or tend to create a monopoly. It is their position that with each such acquisition respondent obtained an additional measure of competitive strength and potential; thus, they argue, each such accretion of competitive power contributed to respondent's already substantial competitive advantage over a significant number of small competitors located in the various relevant sections of the country.

Counsel supporting the complaint state that in connection with this cumulative theory it is necessary to evaluate and consider each acquisition in relation to each other acquisition. However, in their view, it is not necessary to determine the point at which an accumulation becomes unlawful; that is, they contend that once unlawful effect is achieved, the whole cumulative series becomes tainted with an illegality which cannot be cured by partial divestiture. Following this theory to its logical conclusion, they argue from the premise that unlawful effect has been achieved by the series of acquisitions, that this acquisitional accumulation became illegal with the combination of the second acquisition with the first acquisition in the series of acquisitions covered by the complaint, as amended.

As we have previously pointed out in this opinion, the legislative history makes it clear that Section 7, as amended, is intended to permit intervention in a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition. However, we do not think Congress intended Section 7 to be applicable to the extent urged by counsel supporting the complaint. In effect, they would substitute their theory for the proof of adverse competitive effect specified by the statute.

It is our opinion that the cumulative effect of a prior series of acquisitions by a respondent is an important element in determining the legality of a particular acquisition under consideration. As in the *Jerrold Electronics* case,[13] the cumulative effect of prior acquisitions may be such that, although not sufficient to require divestiture, there exists a reasonable probability that the effects condemned by the statute will occur as the result of any future merger. Although it can be shown from a consideration of all the facts, including the cumulative effects of prior mergers, that a later acquisition does have the required adverse competitive effects, this obviously does not constitute proof that such previous mergers were also illegal. Accordingly, we must reject the argument of counsel supporting the complaint on this issue.

One further aspect of this cumulative theory requires our comments. As we interpret the initial decision on this point, the hearing examiner ruled that this cumulative process has no application to those mergers where respondent and the acquired concerns did not operate as competitors in the same geographical areas. Thus, he ruled that the cumulative effects of respondent's mergers cannot be considered in determining the legality of its conglomerate and market extension acquisitions.

[13] *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960).

It is obvious from our previous discussion of the competitive situation existing in the dairy industry and the advantages of diversification, that acquisitions by large firms in this industry have implications for competition regardless of the fact that they do not occur in markets in which the acquiring firms already operate. It is equally clear from the legislative history that Section 7, as amended, is intended to embrace all types of acquisitions regardless of their designations. Therefore, the question of whether a particular conglomerate or market extension merger violates Section 7 must be answered, just as in the case of horizontal mergers, by a showing that the merger may have the effect of substantially lessening competition or tend to create a monopoly.

The hearing examiner's ruling on this point presents a question as to the type of evidence which is required for such a showing. Here we find the House and Senate Reports to be of assistance. First, it should be recalled that the House and Senate hearings and reports on amended Section 7 made extensive references to the *Report of The Federal Trade Commission On The Merger Movement.* Among other things, the House Report accompanying amended Section 7 used examples from the Federal Trade Commission report to describe the types of mergers it intended Section 7 to cover. For example, it used The Borden Company's acquisitions during 1940–47 to illustrate what it meant by conglomerate mergers. In fact, the term "conglomerate merger" apparently first came into common usage with the publication of the Federal Trade Commission report on the 1940–47 merger movement. Within this context it seems appropriate to see what that report had to say on the significance of conglomerate mergers:

> . . . With the economic power which it secures through its operations in many diverse fields (the giant conglomerate corporation may attain an almost impregnable economic position. Threatened with competition in any one of its various activities, it may sell below cost in that field, offsetting its losses through profits made in its other lines—a practice which is frequently explained as one of meeting competition. The conglomerate corporation is thus in a position to strike out with great force against smaller business in a variety of different industries. As the Commission has previously pointed out, there are few greater dangers to small business than the continued growth of the conglomerate corporation.[14]

This description emphasizes the early awareness of the Commission to the potential dangers to competition of the acquisition of a small independent firm by a large conglomerate one. The remaining small firms in such a market may be placed at a serious competitive disadvantage. Whereas their survival and profitability are determined by how well they do in selling a particular product in one market or a

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[14] *Report of the Federal Trade Commission on the Merger Movement,* 1948, p. 59.

few markets, the conglomerate firm's profitability and survival depends upon its market position in many products sold in many markets. The resultant disparity in size and type of operations permits the large conglomerate to strike down its smaller rivals with relatively little effort or loss in over-all profit.

This potential market advantage of the conglomerate firm is also possessed by a firm which sells a single product, but sells it in many separate markets. In this case, its operations in individual markets are not constrained solely by market conditions peculiar to it. It is for this reason that mergers involving market extensions such as Foremost made in entering many new markets, may also be viewed and judged, in part, on the same grounds as conglomerate mergers. Therefore, in this consideration of the type of evidence required to establish a violation of Section 7, conglomerate and market extension acquisitions must be treated together, as did the hearing examiner.

There are no final Commission or appellate court decisions involving conglomerate mergers brought under Section 7. There are, however, eloquent examples of the achievement of conglomerate power and the use of such power which have violated the Sherman Act.[15]

Amended Section 7 is designed to prevent the development of monopoly in its incipiency. The test is not intended to be mergers *resulting* in substantial market power and actual elimination of competition but rather mergers which *may* tend to lead to this end result. This distinction between proof as to *actual* injury required under the Sherman Act, and *potential* injury under Section 7 is well documented in decisions involving horizontal and vertical mergers. Applying this distinction to market extension mergers leads to a logical inference that under Section 7, the necessary proof of violation of the statute consists of types of evidence showing that the acquiring firm possesses significant power in some markets or that its over-all organization gives it a decisive advantage in efficiency over its smaller rivals. We think it clear that the cumulative effect of a series of mergers is of importance and has a direct bearing on this market power and possible competitive advantage of an acquiring firm even though a later acquisition takes place in a market in which that firm did not already operate. The aforesaid ruling of the hearing examiner on this point is rejected.

As previously mentioned, it is our opinion that the appeal of counsel supporting the complaint from the hearing examiner's ruling dis-

[15] *United States* v. *E. I. duPont de Nemours & Co.*, 188 Fed. 127 (Cir. Ct. D. Delaware, 1911); *United States* v. *Swift & Co.*, 286 U.S. 106 (1932); *United States* v. *Swift & Co.*, 189 F. Supp. 885 (N.D. Illinois, 1960); *United States* v. *Griffith*, 334 U.S. 107 (1948).

missing the Section 7 charge as to one particular acquisition, which he designated as a market extension, should be granted. We refer to respondent's acquisition of Philadelphia Dairy Products, Inc., Philadelphia, Pennsylvania, and its four subsidiaries.

Many of the relevant facts concerning this merger, as shown on the record, are fully set forth in the initial decision. Briefly, respondent acquired operating control of Philadelphia Dairy in July 1955 and by May 1956, had obtained 96% of the capital stock of that company. Prior to the acquisition, Philadelphia Dairy and its subsidiaries processed and distributed fluid milk and allied products, including ice cream, in Pennsylvania, New York, New Jersey, Delaware, Maryland and Virginia. In 1954, they had net sales of approximately $48,000,000; a net income of approximately $1,200,000, and total assets of approximately $22,000,000.

The only area in which respondent was in competition with Philadelphia Dairy was that surrounding Brooklyn, New York, where they both had engaged in the sale of ice cream prior to the acquisition. In 1954, respondent had sales of 330,225 gallons of ice cream in the Brooklyn area, and Philadephia Dairy's sales were 531,012 gallons.

Philadelphia Dairy sold about one-third of its fluid milk in the Philadelphia area. This made it the third largest dairy in that market and represented 9.3% of the fluid milk sold therein at the time of the merger. Philadelphia Dairy's principal competitors in this market were two subsidiaries of National Dairy and two independents, Abbott's Dairy and Harbison's Dairies.

The hearing examiner ruled that respondent's acquisition of Philadelphia Dairy Products, Inc., primarily a market extension, did not violate Section 7 for the reasons that (1) the evidence does not disclose that Philadelphia Dairy was the dominant concern in the Philadelphia area whereby respondent immediately obtained a decisive competitive advantage, and (2) there is an absence of proof that respondent was able to, and did, utilize monopolistic practices to advance its position in the new area of competition.

This ruling is obviously in error, as it applies Sherman Act tests to a Section 7, Clayton Act, proceeding. As we have heretofore stated, the only test under Section 7, as shown by the legislative history and interpreted by the courts, is whether there is a reasonable probability of a substantial lessening of competition or tendency to a monopoly as the result of a merger. We repeat the well-settled principle that Section 7 is intended to supplement the Sherman Act and prevent competitive evils in their incipiency. We agree with the argument of counsel supporting the complaint that Congress did not intend the

Commission to sit back until the dominant concern in a market was acquired or monopolistic practices became an actuality before proceeding under Section 7.

The hearing examiner held that the above tests applied in determining the legality of all of respondent's acquisitions characterized as market extensions. While this holding is in error, we have concluded from a review of the record that the evidence will not sustain a finding of probable adverse competitive effects in any acquisition of any type, other than those ordered divested by the hearing examiner, with the exception of the one with which we are here concerned, Philadelphia Dairy Products, Inc.

From the facts set forth above, it is clear that Philadelphia Dairy represented a substantial factor in the Philadelphia area. Its 1954 sales of about $48,000,000 were equal to respondent's sales in 1950. This merger greatly augmented respondent's size and contributed substantially to the market power associated with very large-scale operations.

Philadelphia Dairy's growth experience demonstrates that it grew with the expanding Philadelphia market and indicates that it constituted a substantial competitive factor in that market. Also, its growth pattern indicates that by 1956 it had expanded outward from Philadelphia into a six-state area. Its profits at the time of acquisition indicate that it was a vigorous, successful, independent firm which had succeeded in competing with its larger rivals.

The acquisition of Philadelphia Dairy by respondent replaced a large, growing, successful, independent dairy operating in a six-state area, with Foremost. It is true that apparently the only immediate effect on competition was in the Brooklyn area. However, we are concerned with the probable ultimate effect. Respondent's growth history prior to the acquisition demonstrates that it was rapidly expanding its operations over an ever-widening front, and that this expansion was bringing it ever closer to Philadelphia Dairy's market areas. By the end of 1950, respondent had expanded outward from Florida until it blanketed almost all of the Southern States. Also, prior to 1950 it already had penetrated Pennsylvania with the purchase of the ice cream business of Meadow Gold Dairies, Inc., in Pittsburgh. It also operated its ice cream plant in Brooklyn, New York, as early as 1942.

After 1950, respondent expanded its operations northward from its base of operations in Florida. In 1952, it acquired the aforementioned Southern Maid, Inc., in Bristol, Virginia, and the Welch Milk Co., in Welch, West Virginia. In 1953, it acquired Old Hundred, Inc., operating an ice cream business in Southbury, Connecticut, with sales of $2,291,000 in 1952. In 1954, respondent acquired Thompson Brothers Ice Cream Co., which operated within a 100 mile radius of Butler, Pennsylvania. Butler is located north of Pittsburgh.

It is within the context of this prior growth pattern of respondent that its acquisition of Philadelphia Dairy should most properly be viewed. Here we have an acquiring firm which had been located in Philadelphia Dairy's Brooklyn market since 1942, had entered western Pennsylvania before 1950 and in 1954 acquired another firm in western Pennsylvania, had expanded by merger its position in Virginia and West Virginia in 1953, and had penetrated Connecticut to the east of Philadelphia Dairy's market in 1953. These facts indicate to us that not only did this merger result in the elimination of actual competition in and around Brooklyn, New York, at the time of the acquisition, but the merger resulted in the elimination of potential competition between respondent and Philadelphia Dairy throughout the six-state area in which the latter firm operated. Respondent's expansion was bringing it ever nearer to Philadelphia Dairy's market perimeter; then, rather than compete its way into this very sizeable market, Foremost acquired Philadelphia Dairy, one of the largest independent dairies in the country. Had the respondent not acquired Philadelphia Dairy, respondent would still have had an incentive to enter by external expansion, and Philadelphia Dairy would have had an incentive to penetrate respondent's areas.

Both concerns had the financial and other resources to make such a penetration. Respondent's pre-1955 growth history in other areas and in the Pennsylvania-New England-West Virginia-Virginia areas is a clear indication that respondent would, in all probability, have closed the perimeter and entered Philadelphia Dairy's market areas in the near future. Significantly, while the record demonstrates that Foremost showed a predilection for growth by the merger route, it can and has grown via the internal growth route as well. Its own pre-1950 and post-1955 growth history attests to this. For example, in its 1949 Annual Report, Foremost discussed the three types of expansion followed during the year. It first discussed the "new communities" served by Foremost. In this category it included Chipley, Florida, where it "started an entirely new milk processing and distributing business," plus other areas which it had entered through acquisition or internal growth. The second type of expansion discussed new communities served from existing plants. Included in this category was "Fort Pierce, Florida—where ice cream made in our Miami plant is now being distributed." Also, "Americus, Georgia—where we are now distributing ice cream from a plant which was formerly devoted exclusively to the manufacture of butter." The third category mentioned involved improvements in established plants. Thus, in addition to growing by mergers, Foremost entered some new markets by building new plants in them; it entered others by serving them from established plants located in other markets.

The record also indicates that Foremost expanded into new markets following acquisitions. For example, the record shows the following geographic expansion in Kansas, Missouri, and Arkansas, between the time it acquired American Dairies in 1954, and January 1, 1957. The Joplin, Missouri, sales area was expanded to include Independence, Kansas; Bridge Hill, Butler, and Adrian, Missouri. The Kansas City, Missouri, sales area was expanded to include Kansas City, Kansas, and Columbia, Missouri. The Paragould, Arkansas, sales area was expnded to include Poplar Bluff, Missouri; Forest City, Parkin, Earl, and Batesville, Arkansas.

The unique aspect of the Philadelphia acquisition is Philadelphia's substantial size and widespread operation. For here Foremost acquired a firm which was as large in 1955 as was Foremost in 1950, the year before it embarked upon its merger-accelerated growth of the 1950's. Philadelphia clearly had the ability to expand its operations. Between 1946 and 1952 it spent ten million dollars on expansion. About nine million dollars of this was spent on new plants and equipment and about one million dollars was devoted to acquiring other concerns. In commenting on the acquisition of Philadelphia Dairy, Foremost's 1954 Annual Report stated: "Long recognized as one of the best managed and well-established enterprises in the dairy field, Philadelphia Dairies processes and distributes an extensive line of dairy products from Westchester County, N.Y., to Richmond, Virginia, including Dolly Madison ice cream, one of the most popular high quality brands of the East."

The probable adverse effect of this merger on potential competition becomes apparent when viewed in the industrial environment within which it occurred. Much of the discussion elsewhere in this opinion concerning this environment has a direct application to the significance of this acquisition. The decline in fluid milk distributors, the increasingly harsh technological and market factors confronting small businesses, the advantages going to firms with large financial resources, all indicate that small dairies are having an increasingly difficult time. This speaks ill for the prospects of new entrants in this industry. As pointed out above, in decades past, new competitors could enter this industry relatively easily. But, today, technology and other factors have created substantial barriers to prospective entrants. In this situation the chief source of new rivals in local milk markets is the entry of firms already operating in other markets. However, when such established firms enter new markets by acquiring the leading independent firms, they destroy potential competition in two ways: they eliminate the acquired company as a competitor in the acquired firm's markets, and the acquired firm is removed as a potential entrant in the acquiring firm's markets. Such mergers dry up the most promising source of potential competition. As evidenced by the Texas and California markets, this is not an untested hypothesis. In Philadelphia it is becoming, if it has not already become, a reality. At the time of this acquisition, the large National Dairy had entered and was well established in this market through Supplee Milk & Ice Cream Co., described as being by far the largest company in the area in fluid milk, and through Breyer Ice Cream Co., estimated to be the largest ice cream company in the world. Foremost, of course, became the third largest dairy in the market throught its acquisition of Philadelphia Dairy. The record does not disclose the current status of Abbott's Dairy, which apparently was the second largest dairy in 1954. However, the record does show that in 1956, Borden purchased Sylvan Seal Company, Inc., a Philadelphia concern, which, as indicated by the Dairy Credit Books, had very substantial milk distribution in that area. The transformation in this market is, therefore, nearly complete. Large firms are replacing the largest independents and have forever removed them as potential competitors of the acquiring and other dairies.

As previously noted, continuation of recent developments indicates that there may be relatively few fluid milk firms surviving in this industry within another decade. When market concentration is high, the main, and sometimes the only, restraint on the use of market power by oligopolistic sellers is potential competition. This makes it imperative that especially those independent firms with the capacity to offer present and potential competition not be eliminated by their large potential rivals. It is our judgment that this was the sort of situation which the framers of amended Section 7 had in mind when they expressed concern with mergers which tended to lessen competition. Accordingly, we find that the effect of respondent's acquisition of Philadelphia Dairy Products, Inc., may be substantially to lessen competition. The hearing examiner's ruling that this acquisition does not violate Section 7 is in error, and his order will be amended to require divestiture of this concern.

The hearing examiner found that respondent's acquisition of Florida Dairies Company in 1955 gave it a decisive competitive advantage over its competitors in the sale of fluid milk in the Miami, Florida, area. However, he ruled that Florida Dairies was not engaged in commerce within the meaning of Section 7. Counsel supporting the complaint has appealed this ruling.

It is clear from the record that Florida Dairies sold no dairy products outside the State of Florida. It did, however, sell in its local market heavy cream, condensed skim milk and cottage cheese which it purchased from a wholesale supplier operating a warehouse in Miami, who had previously purchased these items from a supplier outside the State. These purchases, it is argued by counsel supporting the complaint, provide sufficient basis for the statutory requirement of interstate commerce.

Counsel have cited several cases in support of their position. However, most of those cases involve proceedings under the Sherman Act, and, moreover, the facts are distinguishable from those herein. As was the situation in the three Texas acquisitions which we previously discussed, the cases primarily relied upon involve the purchase and movement of goods from an out-of-state supplier directly to the company under consideration. Here, however, it appears that Florida Dairies had made purchases of goods which had moved in commerce but which, insofar as we can determine from the record, had come to rest in the hands of a wholesaler. Florida Dairies did not place the order for the products with the out-of-state supplier, nor is there any indication that the wholesaler placed any particular order with the intention or expectation that it would be reshipped to Florida Dairies. Under the circumstances, the evidence does not sustain a finding that Florida Dairies was engaged in commerce and the appeal of counsel supporting the complaint on this issue is denied.

There remains for our consideration one final issue presented by counsel supporting the complaint. As originally stated herein, the amended complaint in this matter, in addition to the Section 7 Clayton Act charge, also charges a violation of Section 5 of the Federal Trade Commission Act. Specifically, the complaint charges that respondent's constant and systematic elimination of actual and potential competitors by means of the acquisitions referred to therein, including those of noncorporate organizations, as well as corporations which were not engaged in commerce, are all to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5.

Throughout this proceeding, including his disposition of the Section 5 charge in the initial decision, the hearing examiner has been consistent in his position that the Commission does not have authority to proceed under Section 5 in a matter involving mergers. However, as a result of two interlocutory rulings by the Commission, we are allowed the benefit of a record from which a conclusion on the merits of the Section 5 charge can be based.

Counsel supporting the complaint has used a two-pronged approach in their attempt to prove a Section 5 violation. They first contend that Section 5 has been violated for the reason that each individual acquisition charged in the complaint, whether or not such acquisition meets the commerce and corporate requirements of Section 7, has the adverse effect on competition prescribed by Section 7. It is not necessary to rule on the validity of this effort to establish an unfair method of competition by a showing of individual illegal acquisitions as we conclude that the evidence in this record will not sustain a finding of the Section 7 adverse competitive effect requirements as to each of respondent's acquisitions upon which counsel rely.

Counsel supporting the complaint's second approach to the Section 5 charge is a broader application of the cumulative theory previously discussed under the Section 7 charge. Their argument here is broader in that they include in their consideration of cumulative effect not only those acquisitions meeting the technical requirements of Section 7 but also respondent's acquisitions of enterprises which either are not corporations or are not engaged in commerce. In substance, their argument here, as under Section 7, is that the cumulative effect of these acquisitions may be substantially to lessen competition or tend to create a monopoly in the dairy industry. They maintain that respondent obtained an additional measure of competitive strength and potential through each acquisition which contributed to its already substantial competitive advantage over numerous smaller rivals.

We have previously rejected the argument under Section 7 that certain acquisitions in a series of acquisitions, none of which can be shown to have the adverse effect on competition required by Section 7, become illegal and may be ordered divested for the reason that the cumulative effect on competition of these prior mergers may be such as to make any further acquisition illegal. On the other hand, we have no doubt that where, as here, a respondent with a proclivity for growth by acquisitions is charged with a violation of Section 5, the cumulative effect of all of its acquisitions is of importance. This, however, is not the only factor to be considered in determining whether such respondent should be required to cease and desist from making further acquisitions. Counsel supporting the complaint has introduced certain evidence as to the effect on competition of all of respondent's acquisitions considered cumulatively. We note, however, that an order requiring respondent to divest itself of certain corporations will to that extent dissipate the cumulative effect on competition of all of these acquisitions. We have found that ten of respondent's corporate acquisitions are illegal and our order will require divestiture of those concerns. We are fully aware of the problems connected with "unscrambling" commingled assets—problems inherent in almost every merger matter which has come before us. Weighed, however, against a consideration of such difficulties must be a consideration of the protection of the public interest—the restoration of stifled competition. We believe that we can protect the future of the dairy industry by continued vigilance, but that is not enough. We must make a forthright effort to restore competitive conditions. This requirement for divestiture will reduce Foremost to less than one-half its present size and return it to approximately the same relative position it held in the industry prior to 1951.[16] It is our opinion that there is not sufficient evidence in this record from which to determine the competitive effects of any future acquisitions by Foremost after these divestitures. Accordingly, the appeal of counsel supporting the complaint on this issue must be denied.

All other issues which have been raised by respondent and counsel supporting the complaint in their appeals have been considered and are rejected. The appeal of respondent is denied and the appeal of counsel supporting the complaint is granted in part and denied in part. The initial decision to the extent that it is contrary to the views expressed in this opinion will be modified to conform with such views. An appropriate order will be entered.

Commissioner Elman dissented in part and Commissioner MacIntyre did not participate in the decision herein.

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[16] While it has been said that the Commission's orders are remedial rather than punitive, nevertheless, it is generally recognized that orders of divestiture have certain harsh and punitive characteristics. Compliance with the specific divestitures required here will involve massive changes in the respondent's corporate structure. This the respondent should have considered when it deliberately embarked upon its program of acquisitions. Protection of the public interest is the paramount consideration, as the Supreme Court said in *United States* v. *duPont & Co.,* 366 U.S. 316, 323 (1961):

"The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. 'A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.' *International Salt Co.* v. *United States, supra,* p. 401."

OPINION, DISSENTING IN PART

By ELMAN, *Commissioner:*

It is regrettable to find oneself unable to join an opinion containing so much that is fundamentally reasonable and right. In its abstract discussion of the standards of legality governing mergers under Section 7 of the Clayton Act, the opinion expresses broad general principles which are unimpeachable. Yet, when it comes to judging Foremost's series of acquisitions and formulating appropriate relief, the Commission seems to lose sight of these salutary principles. The result, I fear, may be to create needless confusion and uncertainty.

I

In refreshing contrast to some earlier pronouncements on the subject, the Commission's opinion here recognizes that the 1950 amendment of Section 7 of the Clayton Act reflects a Congressional policy towards corporate acquisitions that is not to be deduced merely by reading the words of the statute. The long, careful consideration given to the legislation by Congress evidences a mood and attitude towards mergers that must be taken into account by those charged with giving Section 7 practical meaning and effect.

Congress, to be sure, was concerned with excessive concentrations of *economic* power resulting from mergers; but its concern went far beyond the narrow economic implications of such concentrations. As Professor Bok has pointed out, Congress—observing that "competitive, small-business industries * * * were steadily being transformed by mergers into oligopolies"—was fearful that "the growth of these large economic groups could lead only to increasing government control; freedom would corrode and the nation would drift into some form of totalitarianism. * * * There were arguments that concentration narrowed the opportunity to have one's own business, depressed local initiative and civic responsibility, and diminished the scope of entrepreneurship by forcing small businesses to become ever more subject to the dictates of large concerns. * * * [I]t seems abundantly clear that 'competition' meant far more to Congress than prices, costs, and product innovations." (Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 235–36, 248 (1960).)[1] In short, the conclusion which starkly emerges from the

[1] See also the excerpt from the House committee report quoted in footnote 4 of the majority opinion.

legislative history is that the policy expressed by Congress in amending Section 7 was political and social, as well as economic.[2]

II

In my concurring opinion in the *Union Carbide* case (Docket 6826, September 25, 1961), I urged the Commission to lose no more time in formulating, as best it can, reasonably clear and specific criteria for determining the legality of corporate mergers. As I there stated, it serves the interest neither of effective administration of the statute nor of affording necessary guidance to businessmen for the Commission to announce that it will judge the legality of mergers upon consideration "of all the relevant facts of competition and other market factors" and that "every case must be decided on its own facts."

In the light of the Congressional policy on mergers expressed in Section 7 and its legislative history, the Commission surely can differentiate among relevant factors, indicating which are more significant and which less, and proceed to develop workable standards of legality. In dealing with cases under the Sherman Act, where the statutory guidelines are less precise, the courts have been able to define limits of "restraint of trade" by recognizing certain types of business activity as *per se* violations and by formulating intelligible and consistent standards for judging activity falling within the so-called "rule of reason." Referring to the Sherman Act cases, Judge Friendly has observed: "It would seem that if courts have been able thus to crystallize general standards, administrative agencies should be able to do something of the sort, even though they can hardly take as many years to get the job done." [3]

III

Foremost's series of acquisitions does not fit neatly into the "horizontal" or "vertical" categories within which most previous Section 7 cases have been decided. Although a few of these acquisitions were in

[2] A recent editorial in the London *Economist* (February 3, 1962) indicates that a discerning observer from without can sometimes see more clearly than those within. The editorial discusses "the mistaken assumption—which economists are guilty of encouraging—that political objections to monopoly can be altogether based on evidential grounds, economic or technical." It goes on:

"The United States—which is often accused in Europe of having an exaggerated animus against monopoly, because it has a policy that quite often works—seldom falls into this trap. Its legal prejudice, *per se*, against anything calculated to restrain competition, is avowedly based, in the last resort, on social and even moral grounds; the economic efficiency that it believes competition generally promotes is the secondary justification, not the fist. Primarily, American attitudes towards monopoly (public as well as private) are based upon a distrust of concentrations of economic power, irresponsible in that they are not finally accountable to the public. This does not make American anti-trust legislation emotional and ineffective; it makes it at times even embarrassingly effective."

[3] Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards,* 75 Harv. L. Rev. 863, 877 (1962).

markets in which Foremost was already doing business, there competitive significance is obviously not as a group of unrelated and for the most part unimportant acquisitions, but as part of an industry trend or pattern whereby Foremost and a few large competitors have become national companies dominating the dairy industry. It is for this reason that the present case takes on special significance. It furnishes timely occasion for the Commission to make clear that the "competition" which Congress intended to preserve and protect in Section 7 is not a narrow economic concept.

The kind of mergers here involved was very much in the minds of the legislators who in 1950 amended Section 7 of the Clayton Act. Indeed, the House committee report on the amendment cited the acquisitions made by one of Foremost's competitors as an example of the type of behavior with which it was concerned (H. Rept. 1191, 81st Cong., 1st Sess., p. 11). Similar mergers have also received the continued attention of the Commission both before and after the amendment of Section 7. Acquisitions in the dairy industry were the subject of reports published in 1937, 1948,[4] and 1955 and have been challenged in four Commission complaints, including this one, issued in 1956.

The general principles stated in the first part of the Commission's opinion give promise of a broad and comprehensive disposition of the issues raised by a series of acquisitions of this type. Reviewing the legislative history of the 1950 amendment to Section 7, the opinion recognizes that a primary concern of Congress was to prevent the demise of traditionally small business industries (p. 1051) and that the amended statute was intended to prevent such transformation of an industry from being achieved through a process of cumulative acquisitions (p. 1050). From the outset the Commissions opinon makes clear that Foremost's acquisitions are not to be viewed separately and in isolation but cumulatively and against the background of its total growth and development (p. 1049) and of transforming

[4] The type of acquisition pattern which has transformed the dairy industry was vividly described in the 1948 report:

"Typically, the firms which have followed this pattern have grown by buying up concerns making the same product in one or a few localities, strengthening their position in those localities by additional acquisitions, branching out to obtain control in other localities, consolidating their local acquisitions into broad regional or district organizations, bringing into the fold leading companies in the major regions, and, by this steady pattern of encroachment, becoming nation-wide organizations with a substantial degree of control in the Nation as a whole, a much higher degree in many of the important regions, and a near-monopoly position in numerous individual localities.

"It is in such fields as dairy products and bread that this type of merger activity has been pushed most vigorously. In fact, the growth of such outstanding nation-wide companies as National Dairy Products Corp. and Borden Co. could be likened to an acquisition itinerary, sweeping across the country from one large city to another, and gathering in its wake hundreds of companies serving small communities as well." (Report of the Federal Trade Commission on the Merger Movement, p. 37.)

structural changes in the dairy industry whereby a few major companies have grown large by acquisitions while the rest of the industry continues to be made up of small independent companies—a trend which, as has been stated, was noted by the Commission in three of its economic reports and by complaints challenging the legality of acquisitions by others of the large dairy companies (pp. 1058–1059).

IV

Though seeming to have recognized the primacy of these broad legislative objectives, in the light of which the Commission could realistically judge Foremost's acquisitions in their totality and as contributing to the drastic transformation of the structure of the dairy industry, the Commission's opinion does not give them sufficient application, I believe, in dealing with the facts of this case. With minor exceptions, only the eight "horizontal" acquisitions which the examiner found unlawful are discussed by the Commission in relation to their industrial setting. The principal exception is with respect to the acquisition of Philadelphia Dairy. Even there, Foremost's growth pattern in the Philadelphia area is relied on only as a basis for the conclusion that the acquisition eliminated potential competition with Foremost, and not as reflecting a broad trend toward increasing concentration and decreasing competition in the dairy industry. As to the remainder of Foremost's acquisitions, although the Commission expressly rejects the examiner's refusal to consider the cumulative effect of a series of "market extension" acquisitions (pp. 1084, 1085), its own view of the matter is no broader. It concludes merely that considered individually the evidence does not support a finding that the various acquisitions are likely to have the required adverse competitive effects (p. 1081).

The reason for this narrow approach is not altogether clear. It seems to stem in part from the rejection of Commission counsel's contention that where a series of acquisitions may substantially lessen competition, the entire series becomes tainted and it is unnecessary to determine at what point in the series the competitive effects reached the level proscribed by the statute. But although the Commission was perhaps justified in rejecting this theory, surely this should not have affected the decision here. The period covered by the complaint did not begin until 1950, and by that time Foremost had already made 41 acquisitions (p. 944) and its major competitors had made may more. Even though Section 7 may not reach these pre-1950 acquisitions, their effect should certainly be considered in determining the effect of those taking place after that date. In short, the incipient, if not the actual, effects of Foremost's acquisitions must have become apparent by 1950.

A more plausible reason for the Commission's failure to consider Foremost's series of acquisitions in broad perspective is that although the opinion refers generally to the trend of acquisitions in the dairy industry as a whole, detailed information concerning this transformation of industry structure is not to be found in the record of this proceeding.

This information is not, however, unknown or unavailable to the Commission. As the majority opinion points out, the Commission described in detail the acquisitions by several of the leading dairy companies in its three economic studies mentioned above, and this information has subsequently been supplemented by factual data introduced in the Commission's proceedings challenging the acquisitions made by four of the major dairy companies. For example, data introduced in two of the other dairy proceedings indicates that between 1923 and 1961, eight large dairy companies made a total of nearly 2,000 acquisitions.

It is precisely this type of industry information, gathered in the performance of its various functions, which provides the Commission with the knowledge and experience upon which Congress expected it to rely in determining the legality of competitive practices. To avail itself of this information in the present case, the Commission need only make a limited remand to the examiner with precisely-drawn instructions as to the type of evidence which should be received to complete the record.

V

The failure of the Commission adequately to apply the broad principles stated in the first part of its opinion is also reflected in the relief which it orders. Divestiture of the largest of the acquisitions which the Commission finds unlawful, most importantly those of Golden State and Philadelphia Dairy, is unquestionably required, and reestablishment of these companies as independent competitors should help restore competitive conditions in the dairy industry.[5]

[5] I question whether divestiture of some of the relatively unimportant acquisitions which the Commission finds illegal is equally necessary. The Commission gives no weight to the problems of "unscrambling" commingled assets and to the perhaps insuperable practical difficulties of restoring as competitive entities these relatively small companies whose operations have for nearly ten years been fully integrated into Foremost's business. My concern is not with possible hardship to Foremost but rather with whether it is possible as a practical matter now to reestablish these companies as independent competitors. I

An order limited to such divestiture, however, is aimed at undoing the effects of past acquisitions; it does not prevent for the future the continuation of the merger trend which has so radically altered the structure of this industry. If the Commission's prime concern should be, as I believe, with increasing concentration and the elimination of the rapidly dwindling number of independent companies still left in the industry, divestiture alone will not suffice. Nor is divestiture the only kind of relief which the Commission may order in a Section 7 case. See *United States* v. *duPont*, 366 U.S. 316, 328, note 9. Although a court may be reluctant to enter an order requiring continuing future supervision over industry practices and conditions, an administrative agency is not restrained by such inhibitions, and indeed the exercise of continuing administrative oversight is one of this Commission's primary responsibilities.

In addition to the divestitures indicated, the most effective form of relief here would be to impose on respondent the specific obligation to submit any future acquisitions to the Commission for scrutiny and approval before consummation. Such a requirement is particularly appropriate in a case like this, where the paramount public interest, and indeed the express objective of the statute, is the attainment and preservation for the future of healthy competitive conditions. Congress has endowed the Commission with "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611; and see *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428–429. "Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices." *Ruberoid Co., supra*, 343 U.S. at 473. And, in my judgment, the public interest would best be served here by an order looking primarily to the future.

also question whether the practical problems of divestiture have been fully considered in the conditions which the Commission imposes upon the divestiture of Golden State and Philadelphia Dairy. Certainly the Commission will not permit the sale of these companies to an even larger dairy company since they are already among the leaders of the industry. At the same time, the likelihood that they could be sold to a smaller company or to one in an unrelated industry seems highly remote. As a practical matter, therefore, it would seem to me that their restoration as effective independent competitors might most practically be accomplished through a distribution of their stock to Foremost's stockholders, along the lines of the relief ordered in the *duPont* case.

FINAL ORDER *

This matter having come on to be heard upon the cross-appeals of respondent and counsel in support of the complaint from the hearing examiner's initial decision filed December 9, 1960, including the briefs and oral arguments of counsel; and

The Commission having rendered its decision denying the appeal of respondent and granting in part and denying in part the appeal of counsel in support of the complaint, and directing modification of the initial decision:

It is ordered, That the hearing examiner's initial decision be modified by striking therefrom the findings beginning on page 969 with the words "Respondent was in competition" and ending on page 970 with the words "another 'independent'" and substituting therefor the findings embodied in the accompanying opinion beginning on page 1086 with the words "From the facts set forth above," and ending on page 1089 with the words "divestiture of this concern."

It is further ordered, That the initial decision be modified by striking therefrom the conclusion beginning on page 1019 with the words "As to Philadelphia Dairies," and ending on page 1019 with the words "was not substantial" and substituting therefor the following:

Respondent was in competition with Philadelphia Dairy Products, Inc., in the sale of ice cream in the Brooklyn, New York, area prior to its acquisition of that company. Philadelphia Dairy's estimated share of the fluid milk market in the Philadelphia area at the time of the merger was 9.3%, making it the third largest dairy in that market. At that time, Philadelphia Dairy had expanded its operation so that it was processing and distributing fluid milk and allied dairy products, including ice cream, in a six-state area. Respondent's expansion was such that it was operating on the perimeter of Philadelphia Dairy's market, and its growth pattern clearly indicates that it would have expanded into that market in the near future. By acquiring Philadelphia Dairy, respondent eliminated an actual competitor in one area and a substantial potential competitor throughout a six-state area. In the Philadelphia area, large national dairy concerns, with the attendant advantages of product and geographic diversification, are replacing large independent concerns, thereby eliminating them as potential competitors. The effect of this acquisition may be substantially to lessen competition in the processing and distribution of fluid milk and ice cream.

*As modified, May 15, 1962.

It is further ordered, That the initial decision be modified by striking therefrom the conclusion beginning on page 1023 with the words "The following is the position" and ending on page 1028 with the words "National Lead case" and substituting therefor the findings embodied in the accompanying opinion beginning on page 1090 with the words "There remains for our consideration" and ending on page 1092 with the words "on this issue must be denied."

It is further ordered, That the initial decision be modified by striking therefrom the conclusion beginning on page 1034 with the words "In the present case," and ending on page 1035 with the words "should also be considered" and substituting therefor the following:

The requisite adverse effect upon competition or tendency toward monopoly in the relevant lines of commerce resulting from respondent's acquisitions is best evidenced in the following geographic markets: (1) the Dallas, Texas, metropolitan area, including the City of Fort Worth and the surrounding Counties of Cooke, Collin, Dallas, Delta, Denton, Ellis, Fannin, Grayson, Hopkins, Hunt, Johnson, Kaufman, Lamar, Parker, Rockwall and Terrant; (2) the metropolitan area in and around the City of Houston, Texas; (3) the metropolitan area in and around the City of Abilene, Texas; (4) the metropolitan area in and around the City of San Antonio, Texas; (5) the Alameda-Contra Costa, California, metropolitan area, including the Cities of Oakland, Berkeley and Alameda; (6) the San Francisco, California, metropolitan area; (7) the San Mateo, California, metropolitan area; (8) the Santa Clara, California, metropolitan area; (9) the Sioux Falls, South Dakota, metropolitan area; (10) the metropolitan areas of Bristol and Appalachia, Virginia, and Kingsport and Johnson City, Tennessee; (11) the Island of Oahu, Hawaii, including the Honolulu metropolitan area; (12) the metropolitan area in and around the City of Philadelphia, Pennsylvania; and (13) the metropolitan area in and around Brooklyn, New York.

It is further ordered, That the initial decision be modified by striking therefrom the conclusion beginning on page 1040 with the words "Considering first the acquisition of Philadelphia Dairy Products;" and ending on page 1043 with the words "Section 7 of the Clayton Act" and substituting therefor that portion of the accompanying opinion beginning on page 1085 with the words "The hearing examiner ruled" and ending on page 1086 with the words "Philadelphia Dairy Products, Inc."

It is further ordered, That the initial decision be modified by striking therefrom the conclusion beginning on page 1046 with the words "Consideration has been given" and ending on page 1047 with the words "second or later acquisition" and substituting therefor that portion of the accompanying opinion beginning on page 1081 with the words "Counsel also argue" and ending on page 1084 with the words "on this point is rejected."

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondent, Foremost Dairies, Inc., a corporation, and its officers, directors, agents, representatives and employees, shall, within twelve months from the date of service upon it of this order, divest itself absolutely, in good faith, of all stock, assets, properties, rights and privileges, tangible or intangible, including, but not limited to, all contract rights, plants, machinery, equipment, trade names, trademarks, and good will acquired by Foremost Dairies, Inc., as a result of the acquisition of the stock, share capital, or assets of each of the following named corporations: Banner Dairies, Inc., Abilene, Texas; Phenix Dairy, Houston, Texas; Tennessee Dairies, Inc., Dallas, Texas; Southern Maid, Inc., Bristol, Virginia; The Welch Milk Company, Welch, West Virginia; Crescent Creamery Co., Sioux Falls, South Dakota; Moanalua Dairy, Ltd., and Rico Ice Cream Company, Ltd., Honolulu, Hawaii; Golden State Company, Ltd., San Francisco, California; and Philadelphia Dairy Products, Inc., Philadelphia, Pennsylvania, together with all plants, machinery, buildings, improvements, equipment, and other property of whatever description that has been added to or placed on the premises of each of the former above-named corporations by respondent, as may be necessary to restore each of them as a going concern and to establish each of them as an effective competitor in substantially all the same basic lines of commerce in which each of the respective acquired corporations was engaged at the time of its acquisition.

Pending divestiture, Foremost shall not make any changes in any of the above-mentioned plants, machinery, buildings, equipment, or other property of whatever description, which shall impair their present rated capacity for the production of their respective dairy products, or their market value, unless said capacity or value is restored prior to divestiture.

Respondent in such divestiture shall not sell or transfer, directly or indirectly, any of the stock, assets, properties, rights, or privileges, tangible or intangible, acquired, added, modified or placed on the premises of any of the above-named concerns by respondent, to anyone who, at the time of divestiture, is a stockholder of respondent, or to anyone who is or, at the time of acquisition, was an officer, director, representative, employee, or agent of, or otherwise, directly or indirectly, connected with, or under the control or influence of, respondent.

It is further ordered, That, in said divestiture, respondent shall not sell or transfer, directly or indirectly, any of the stock, assets, properties, rights or privileges, tangible or intangible, to any corporation, or to anyone, who, at the time of said divestiture, is an officer, director, employee or agent of such corporation, which, at the time of such sale or transfer, is a substantial factor in the dairy products industry, if the effect of such sale or transfer might be to substantially lessen competition or tend to create a monopoly or oligopoly in any one of the said dairy products, in any section of the country.

It is further ordered, That the charges contained in paragraph 7 of the complaint be, and they hereby are, dismissed.

It is further ordered, That respondent, Foremost Dairies, Inc., shall, within three months from the date of service upon it of this order, submit in writing for the consideration and approval of the Federal Trade Commission, its plan for carrying out the provisions of this order, such plan to include the date within which full compliance may be effected.

It is further ordered, That the hearing examiner's initial decision, as modified and supplemented by the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

Commissioner Elman dissenting in part and Commissioner MacIntyre not participating.

IN THE MATTER OF

SIMPLIFIED TAX RECORDS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8361. Complaint, Apr. 17, 1961—Decision, May 8, 1962

Consent order requiring a New York City seller of business record-keeping systems, including its "Master Edition", "DeLuxe Edition", and "Standard Edition" systems, to franchised distributors to sell to small business men—who were then entitled to receive various consultation and advisory services as well as sets of forms for recording receipts, expenditures, assets, and other data and, in the case of those purchasing the "Master" and "DeLuxe" systems, to have their tax returns prepared by the company—to cease representing falsely in newspaper advertising and other promotional material the income and profits that purchasers of its distributorships would receive, as well as making a variety of other deceptive claims, as in the order below indicated.